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v.
Oakland Scavenger Company, et al.

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for the Ninth Circuit

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Counsel for respondent: Beeson, Duane B., McKae, Stephen

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3	Jun 17 1987	X	Brief of respondent Oakland Scavenger Company in opposition filed.
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9	Nov 27 1987		Brief of petitioner Jose Torres filed.
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13	Jan 29 1988	X	Reply brief of petitioner Jose Torres filed.
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**PETITION
FOR WRIT OF
CERTIORARI**

86 1845
NO. - 22

Supreme Court, U.S.
FILED

MAY 13 1987

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOSE TORRES,

PETITIONER,

VS.

OAKLAND SCAVENGER COMPANY,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, AND HELPERS
OF AMERICA, LOCAL NO. 70,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether, in providing for specification in a timely notice of appeal of the party or parties taking the appeal, Rule 3(c) of the Federal Rules of Appellate Procedure lays down a jurisdictional requirement to be strictly and absolutely applied as the say-all-end-all measure of the appellate court's power to grant relief regardless of whether there may be circumstances calling for relaxation of the rule or for exercise of overriding inherent power.

Whether the doctrine of harmless error honored in Rule 61 of the Federal Rules of Civil Procedure applies to appellate proceedings as well as those in district courts?

Whether, in a potential but uncertified class action, the representative effect of appeals by active class members protects not only entirely absent and

passive members but also a member formerly
but no longer active in the litigation?

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No.

IN THE SUPREME COURT
OF THE
UNITED STATES

JOSE TORRES,
Petitioner,

vs.

OAKLAND SCAVENGER COMPANY

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND HELPERS
OF AMERICA, LOCAL NO. 70,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Jose Torres respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 11, 1986.

OPINIONS BELOW

The writ is sought as to only a relatively small part of the opinion of the court of appeals, which, in the main, dealt with an appeal treated as related to petitioner's but raising different issues and none of importance here. The portion of the opinion now pertinent is reproduced in Appendix A. The order of the district court modifying an earlier one and granting summary judgment against petitioner is reproduced in Appendix B. The order of the court of appeals denying the petition for rehearing and rejecting a suggestion of rehearing en banc is reproduced in Appendix C. The judgment of the court of appeals is re-

produced in Appendix D. The order of the court of appeals denying a motion for recall of its mandate in a prior appeal, amendment of the notice of that appeal, and/or other appropriate relief is reproduced in Appendix E.

JURISDICTION

The opinion of the court of appeals was filed on December 11, 1986. The timely petition for rehearing and suggestion of rehearing en banc were denied and rejected on February 12, 1987, and this petition has been filed within ninety days of that date. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1) and § 2101(c).

PROVISIONS OF LAW INVOLVED

This case involves Title 42 U.S.C. § 1981, R.S. § 1977; § 703, Title VII, of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-2); Rule 3(c), Federal Rules of Appellate Procedure; Rule 61, Federal

Rules of Civil Procedure; and Rule 10.4 of the Supreme Court of the United States. The pertinent provisions of the same are set forth in Appendix F.

STATEMENT OF THE CASE

A. Commencement of the Underlying Action and Jurisdiction in the District Court

An underlying action against respondents was initiated by five persons other than petitioner (hereinafter "Torres") as present or past employees of the company and dues-paying members of the union. By their complaint and first amended complaint, on behalf of themselves individually and of the class of persons similarly situated, the original plaintiffs, two of them black and three Spanish-surnamed, invoked the district court's jurisdiction under the provisions condemning employment discrimination based on race or national origin in Title VII of the Civil Rights

Act of 1964, 42 U.S.C. § 2000(e) et seq., and in the Civil Rights Act of 1866, 42 U.S.C. § 1981. They alleged that the company engaged in intentional, systematic employment discrimination based on race and national origin and that the union was complicit in the matter. By their answers, respondents denied the material allegations against them and raised affirmative defenses.

B. Intervention by Torres and Others After Settlement by the Original Plaintiffs

The five original plaintiffs and respondents negotiated a settlement but only as to the claims of those plaintiffs individually. Although a class action had not yet been certified, it was agreed as part of the consideration bargained for, in addition to a payment of \$50,000 to the plaintiffs, that any claims of persons similarly situated would remain

unaffected, that absent members of the potential class would be given a reasonable opportunity to intervene and pursue the action, and that appropriate notice to that end would be published and mailed. The settlement was approved by the district court, including the notice to be used, which was then published and mailed. As a result of that notice, fifteen Spanish-surnamed persons, including Torres, and one black person filed a motion to intervene as plaintiffs.

Although strenuously opposed by respondents, the motion to intervene was granted. The ensuing complaint in intervention filed jointly by Torres and the other intervenors incorporated the operative allegations of the first amended complaint. It then added allegations that the unlawful employment practices and policies complained of therein had continued, that the intervening plaintiffs

were among the black and Spanish-surnamed employees and union members injured, and that they were proceeding with the action not only on their own behalf but on behalf of the persons similarly situated as well.

C. The Erroneous Dismissal and Successful Appeal

Respondents renewed their attack on the intervention by motions to strike, to dismiss, and for summary judgment. Notwithstanding the opposition by plaintiffs, the court granted the motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground of a failure to state a claim warranting relief, and judgment dismissing the action was entered accordingly. An appeal to the court of appeals (contested by respondent company but not the union) was then noticed and resulted in reversal and remand in a decision reported in 697 F.2d 1297 (1982).

Respondent company sought review by this Court on certiorari but without success.

D. The Showing of the Parties on the Summary Judgment Motion Involved in This Petition

On the remand, after various other proceedings in the district court, respondent company made a motion, later adopted by the union and opposed by plaintiff, for summary judgment dismissing the action as to Torres on the ground that he was not specified as an appellant in the notice of appeal from the erroneous dismissal. The facts before the district court on the motion in question (as distinguished from their proper legal import) were without dispute and, indeed, consisted of matter previously of record to a substantial extent. The company simply established that Torres had not been specified as an appellant in the notice of the prior appeal, had not been listed as an interested party

in the brief of appellants, and had not sought to file a late notice of his own during the appeal. The union made no presentation.

The factual considerations in opposition to the motion were set forth in the declaration and supporting exhibits submitted by counsel for plaintiffs, B. V. Yturbide, who had represented them throughout their involvement in the action. Those considerations were not controverted and included the following:

1. The Representative Nature of the Action

From the inception, it was the intention of plaintiffs, duly reflected in their complaint in intervention, to join together with respect to the basic discrimination issues involved and to do so not only in the promotion of their respective individual interests, but also on behalf of absent members of

a potential class. In its styling, their complaint added the phrase, "individually and on behalf of all others similarly situated." By the allegations in the body of the complaint, the potential involvement of a class action and the desire of plaintiffs to pursue one were made clear.

2. The General and Commonly Adverse Dismissal

The reasoning of the district court leading to the dismissal did not separate Torres from the others in any way or involve any individual variations among the plaintiffs but was addressed to basic, overall considerations which would affect alike plaintiffs as a group and, for that matter, absent members of the same class as well.

3. The Omission Contrary to Intent and Through Clerical Inadvertence

Accordingly, each of the plaintiffs alike, including Torres, intended to pursue the appeal from the dismissal ruling as a whole not only for himself, but also for the rest of the group and for absent members of the potential class, and it was Yturbide's intention so to reflect in the notice of appeal he caused to be typed and filed. However, purely through clerical inadvertence by Yturbide's secretary, Torres' name was omitted from the notice of appeal. In its styling, the notice set forth the name of the plaintiff first in sequence, followed by "et al." Then, at the beginning of the notice itself, the intention was to list all the plaintiffs-in-intervention in alphabetical sequence, and this was done as to fifteen of them, but Torres was not named due to clerical inadvertence.

4. A Mere "Oversight" Without Harm on the Appeal

There is no indication that the clerical error (which was perpetuated when the names as appearing on the notice of appeal were incorporated in the certification of parties interested in the appeal) has ever been harmful to anyone in any way. In particular, there is nothing to indicate that it misled either respondent or the court of appeals or otherwise improperly influenced the appeal. To the contrary, respondent company, who first became aware of the inadvertent omission of Torres' name from the notice of appeal and certification of interested parties, called attention to it and its innocent cause in the brief for appellee. The pertinent footnote in that brief made no pretense of an intention to omit naming Torres as an appealing and interested party and expressly recognized that his name had not been included "apparently by oversight." Neither before nor after

the omission was thus noted did anything occur to suggest that Torres was not to be treated as actually involved and interested in the appeal. The issues argued and resolved on the appeal were not of varying individualized concern but were of general and the same concern to all the plaintiffs and to absent members of the potential class.

5. Respondent's Lack of Concern

At no time during the appeal did respondent, whether by motion to dismiss or otherwise, initiate any proceeding designed to assure that Torres would not be considered a party interested in the appeal and entitled to the benefit of any favorable outcome which might ensue. Indeed, although the aforementioned footnote in the brief for appellee called attention to the omission, nothing was said in that footnote or elsewhere to suggest that respondent opposed the court

of appeals' consideration of Torres as an involved party, let alone that respondent was moving, or intended to move, for a dismissing determination as to him. As far as the court of appeals was given to understand, respondent was not concerned about the acknowledged "oversight."

6. Yturbide's Reasons for Not Raising a Clamor at the Time

On the other hand, it was Yturbide's judgment that no affirmative steps on his part in the court of appeals to assure the continuing viability of the appeal as to Torres was necessary or wise in the circumstances. As he assessed the situation, it embraced the following elements:

(a) The action was such that the notice of appeal had representative potential to protect interested persons not specifically named as appellants, including Torres;

(b) Respondent not only had itself acknowledged that the omission was the result of mere "oversight," but had refrained from assuming a threatening posture in the matter;

(c) The "oversight" would readily be recognized as a purely technical one of no harmful consequence to anyone in view of the generalized issues involved;

(d) Denial to Torres of any relief forthcoming on the appeal would in all likelihood be regarded as particularly harsh since entirely absent persons of the same class would benefit from that relief; and

(e) Altogether, as things stood, the court of appeals, if ultimately reversing the dismissal, would not be inclined to single out Torres but would reverse in a fashion beneficial to all interested persons in general, including him, whereas an effort by Yturbide to

file a late notice of appeal as to him or the like would be regarded as a self-confession that such notice was essential to his sharing in the relief and/or might otherwise serve to give undue importance to a matter about which nobody, including respondent, appeared to be concerned at the time.

7. The Unqualified Reversal

It in fact developed that the court of appeals reversed the judgment of dismissal as a whole without qualification.

8. Respondents' Lack of Prejudice and Attempt to Benefit from Torres' Continued Involvement

Respondents have suffered no prejudice with respect to Torres. In the prior certiorari proceeding before this Court, respondent company for the first time argued in passing that the case remain dismissed as to Torres notwithstanding the Ninth Circuit's decision. It

seemed obvious to Yturbide that no fit occasion for debating the point was presented, and, in any event, no harm to respondents could have come from the lack of responsive comment on a matter which was not, and was not claimed to be, germane to whether or not this Court should intercede. On fit occasion since the remand, plaintiffs certainly did not hesitate to make their opposing views known. Conversely, neither in discovery nor otherwise, did respondents handle Torres other than as one of the ongoing plaintiffs until the motion for summary judgment against him.

Rather than being prejudiced by the continued involvement of Torres in the case, respondents have even endeavored to benefit from it. For example, in support of a motion concerning merits issues in the case, reliance was placed on a part of his deposition taken after the remand

along with those of the rest of the plaintiffs.

E. The Granting of the Summary Judgment Motion and the Lack of Success in the Court of Appeals

The district court granted the motion for summary judgment against Torres. (App. B.) He then duly noticed an appeal to the Court of Appeals for the Ninth Circuit. In addition and by way of pursuing an alternative remedy the court might deem preferable, he moved the court of appeals for recall of its mandate in the prior appeal, amendment of the notice of that appeal to name him, and/or other appropriate relief. That motion was denied without opinion. (App. E.) In a subsequent brief on the appeal, Torres in effect renewed the recall motion, urging that proper disposition was optional and could take the form of either reversing the summary judgment without further

fuss or also recalling its mandate and allowing amendment of the earlier notice of appeal or the like if that approach was regarded as more suitable. Without any further reference to the recall alternative, the court of appeals entered the opinion which, in part, disposed of Torres' appeal and affirmed the summary judgment against him. (App. A.) Following his unsuccessful petition for a rehearing and suggestion of a rehearing en banc and the entry of judgment accordingly (App. C and App. D), the present petition has resulted.

F. Developments in the Underlying Action

Nothing final has yet occurred in the underlying action pending in the district court. After the summary judgment against Torres, that court certified a class of plaintiffs, defined to include "all blacks and all Hispanic surnamed

persons who on or after January 10, 1972, have been employees of defendant Oakland Scavenger Company." Trial of the action was bifurcated, and the liability phase began during pendency of Torres' appeal and has extended beyond disposition of that appeal. Although the parties have now concluded their introduction of evidence and summations, the court has not made its determination as of this date.

REASONS FOR ISSUING THE WRIT

Expressly or by necessary implication, the Ninth Circuit's opinion as to which review is sought disposes erroneously of three somewhat overlapping questions which are of high and far-reaching importance. They are the subject of such conflict among the Circuits, and such disrespect for sound policy and analogous teaching of this Court, as to require this Court's intercession

and supervision in the interest of the square settlement lacking to date.

A. The Circuits Are Sharply Divided As To the Jurisdictional Effect and Proper Application of Rule 3(c) of the Federal Rules of Appellate Procedure. The Harsh View of the Ninth Circuit and Others Clashes with Sound Doctrine and Policy of General Import, Including Analogous Decisions of This Court and Even Its Own Rules.

The stark proposition for which the present opinion (App. A) unmistakably stands is that the say-all-end-all measure of whether courts of appeals have "jurisdiction" or "power" to grant relief is whether or not the one to be relieved has been specifically named in the notice of appeal as originally filed or as amended within the short time allowed for taking appeals. As is apparent from the cases the opinion cites,

the absolute principle thus embraced is traceable to the requirement in Rule 3(c) of the Federal Rules of Appellate Procedure that "the party or parties" to an appeal be specified in a timely notice of appeal. (App. F, p. 3.) Regardless of other circumstances, no exception is made by the opinion even though it acknowledges the "clerical" error by which Torres was not specifically named as an appellant along with the fifteen intervening plaintiffs with whom he had commenced a potential class action for employment discrimination and who succeeded on the appeal in overturning the erroneous dismissal of the action. Relegated to immateriality are not only the clerical inadvertence but the representative potential of the notice of appeal filed, the commonality of appellate issues involved, the appellate relief obtained by even absent class members, and the com-

plete harmlessness of the omission on and after the appeal for all concerned, including the opponent who realized from the start that nothing but a mere "oversight" of no importance to the issues on the appeal or of concern otherwise had occurred.

This rigid view is by no means a novel one but finds support (albeit in factual contexts different from the present one) in decisions not only of the Ninth Circuit but of the Fourth and Sixth Circuits as well. (E.g., Farley v. Santa Fe Trail Transp. Co., (9th Cir. 1985) 778 F.2d 1365, 1368 et seq.; Covington v. Allsbrook (4th Cir. 1980) 636 F.2d 63 [cert. denied (1981) 451 U.S. 914]; Van Hoose et al. v. Eidsen (6th Cir. 1971) 450 F.2d 746, 747; Cook and Sons Equipment, Inc. v. Killen (9th Cir. 1960) 277 F.2d 607, 609.) Yet, at least in exceptional circumstances, it seems clear that a rule of such strictness

can serve to give bare procedural ritual ascendancy over substance and reality, not to mention just plain fairness. There is not always a necessary relationship between all-inclusive specification and any important notice-giving objective of Rule 3(c). It can obviously happen, as here, that an appellee, realizing that a person no less interested than several co-parties specified in the notice of appeal, has not been specified solely through inadvertence, processes the appeal in no different way and without any prejudice or concern by reason of the omission. Not surprisingly, therefore, the rigid approach is in conflict with decisions in several other circuits which have commendably taken a more discriminate and relaxed approach to Rule 3(c) where appropriate. In the context of multiple would-be appellants, persons unspecified in a timely notice have thus been accorded

protection of an appeal, whether by dispositions without concern for actual amendment of the notice or by permitting such amendment belatedly, even after issuance of the mandate on the appeal. The exceptional circumstances forming the basis of such holdings include (a) the "clerical" inadvertence leading to the omission, (b) the commonality of the appellate issues, and/or (c) the lack of the opponent's adverse reliance on the omission or any other harm or prejudice to the appeal or the opponent. The rationale implicit in all those decisions and expressly voiced in some is that rigid application of Rule 3(c) in such circumstances would be unfair and work injustice. The holding in some appears to be that even the customary phrase, "et al.," is alone to satisfy the Rule, let alone, as here, use of that phrase plus specification of fifteen of sixteen co-parties.

(Ayres v. Sears, Roebuck & Co. (5th Cir. 1986) 789 F.2d 1173, 1177; Harrison v. U.S. (8th Cir. 1983) 715 F.2d 1311, 1312-13; Smith & Assocs. v. Otis Elevator Co. (5th Cir. 1979) 608 F.2d 126; Williams v. Frey (3rd Cir. 1977) 551 F.2d 932, 934; Parrish v. Board of Com'rs. (5th Cir. 1974) 515 F.2d 12, 16 [withdrawn on other grounds (1975) 509 F.2d 540]; see also Brubaker v. Board of Education (7th Cir. 1974) 502 F.2d 973, 983 [cert. denied (1975) 421 U.S. 965.]

Illustrative of the degree to which the strict view directly conflicts with the approach in other circuits is the decision in Harrison just cited. A person not originally specified as among the appellants had been omitted through clerical and harmless inadvertence. On remand following the successful appeal, the omitted person moved the district court for an order amending the original notice of

appeal to include his name. The district court denied the motion on the ground that it lacked jurisdiction to grant such relief, and a second appeal ensued. Although agreeing that the district court lacked jurisdiction to permit the amendment, the appellate court, apparently on its own initiative, proceeded to treat the pending appeal as a motion to recall its mandate, recalled the mandate, and amended the original notice of appeal in order to prevent "manifest injustice."

(715 F.2d at p. 1313.)

Additional considerations underscoring the need for this Court's intercession and the improvidence of the jurisdictional view include the following:

(1) The strict view is clearly out of harmony with this Court's closely analogous holding and general guidance in Foman v. Davis, Executrix (1962) 371 U.S. 178, 181-82. An appeal from a judgment

was there held allowable even though the only valid notice of appeal had not specified it as appealed from. This Court reasoned that, in view of the circumstances involved, the defect "did not mislead or prejudice the respondent." It added, "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." (Emphasis ours.)

(2) The fact is that Rule 3(c), even liberally applied, clashes with this Court's Rule 10.4 (App. F, pp. 3-4). The latter provides for automatic inclusion as appellants before this Court of all parties to the proceedings appealed from unless written notice to the contrary is given. Under any view, it seems anomalous that two levels of the same judicial system should operate so differently as to such a vital matter. Certainly, accentuation of the difference by application of Rule 3(c) as an invariable, jurisdictional requirement is at odds with the sound policy underlying this Court's Rules generally (and obviously valid as to all federal rules in view of the holding and comments in Foman discussed above). As Justice Black said years ago in ordering adoption of this Court's revised Rules, "The principal function of procedural

rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." (346 U.S. 945-46 (1954).)

(3) The strict, jurisdictional view is out of harmony with settled doctrine in yet another respect. It amounts to a freakish abdication of broad inherent power to do justice which all courts of appeals have and should rightly have. Being inherent in character, that power, which encompasses, if necessary, recall of mandates already issued, is neither derived from nor limited by federal rules of procedure. (See, e.g., A to Z Portion Meats, Inc. v. N.L.R.B. (6th Cir. 1980) 643 F.2d 390, 392, fn. 1; Dilley v. Alexander (D.C. Cir. 1980) 627 F.2d 407, 410-13; Lamb v. Farmers Insurance Co. (8th Cir. 1978) 586 F.2d 96, 97.) On occasions deemed fit, the Ninth Circuit has exercised that power to recall mandates for

the purpose of correcting even substantive error. (Verrilli v. City of Concord (9th Cir. 1977) 557 F.2d 664, 665; U.S. v. Kismetoglu (9th Cir. 1973) 476 F.2d 269, 270 [cert. dismissed (1973) 410 U.S. 976].) Naturally, such exercise is even more acceptable in the case of clerical mistakes or the like. (16 Wright and Miller, Federal Practice and Procedure (1977) § 3938, Civil, p. 283.)

(4) Some measure of the Ninth Circuit's improvident approach to Rule 3(c) is found in the present opinion's citation (App. A, p. 5) of Trinidad v. Maru (9th Cir. 1986) 681 F.2d 1360, 1362. Although there is dictum in that case referring to Rule 3(c) in a strict sense, the decision actually involved another rule altogether, and, by its holding, the court went out of its way to relax that rule as to the particular would-be appellants involved, refusing to apply the

rule "so strictly" as to throw them out of court.

(4) Nor should it be forgotten that, with respect to civil rights cases like the present one, courts, including the Ninth Circuit itself, have been reluctant to countenance summary dispositions, particularly on the basis of procedural shortcomings. (See, e.g., Thomas v. Younglove (9th Cir. 1976) 545 F.2d 1171, 1172; 10A Wright and Miller, Federal Practice and Procedure (2d ed. 1983) § 2732.2, pp. 340-62.)

B. The Confusion As To Applicability of the Doctrine of Harmless Error in Appellate Proceedings Is Itself Sufficient Reason for Issuance of the Writ.

A related but, in a sense, a different and broader ground for this Court's intercession is that, at bottom, the conflict as to Rule 3(c) reflects confusion among the Circuits as to whether or not

the doctrine of harmless error applies to appellate proceedings as well as those in district courts. Although that doctrine does not appear to find specific expression in the Federal Rules of Appellate Procedure, it is found in Rule 61 of the Federal Rules of Civil Procedure, and in terms so broad as to encompass proceedings at any judicial level. (App. F, p. 3.) In reversing the court of appeals, this Court in Foman, as we have seen (371 U.S. at pp. 181-82), addressed federal rules generally, including specific reference to Rule 1 of the Federal Rules of Civil Procedure. As scholars in the field agree, there is no sound reason why the doctrine of harmless error should not apply to appellate proceedings. (See, e.g., 9 Moore and Lucas, Moore's Federal Practice (2d ed. 1970) § 203.17, pp. 3-70.) Yet obviously, as this case and several others have demonstrated, there

is an important need to settle the point once and for all.

C. An Erroneously Decided Question Is Presented Which Is Novel to This Court and of Sufficient Importance To Require Settlement.

Another question presented here concerns the representative effect to be given to procedural compliance by active class members in a potential but uncertified class action. We are satisfied that, in this light alone, the notice of appeal filed by the fifteen co-parties with whom he had joined as intervenors from the inception served to extend the protection of the appeal to Torres no less than to entirely absent and passive class members unnamed in the notice. Any other conclusion seems to us harsh and absurd, particularly where, as here, the only reason he was not named as an appellant was clerical and harmless

error. Our view, we think, finds considerable, albeit not square, support in Romasanta v. United Airlines, Inc. (7th Cir. 1976) 537 F.2d 915, 918-19, approved in the relevant respect in United Airlines v. McDonald (1977) 432 U.S. 385, 389, fn. 6. However, the point seems far from clear and should be made so.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

B. V. Yturbide, Counsel
of Record
Gunheim & Yturbide
Krause, Baskin, Shell,
Grant & Ballentine
Attorneys for Petitioner

(Appendices follow.)

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Perfecto Martinez, Nolan Madden,
Eugenio Jiminez, Primitivo, et al.,
Plaintiffs,

and

John Ferro,
Applicant for Intervention-Appellant,

v.

Oakland Scavenger Company,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen, and Helpers
of America, Local No. 70,
Defendants-Appellees.

Perfecto Martinez, et al.,
Plaintiffs,

and

Joaquin Morales Bonilla, et al.,
Plaintiffs-in-Intervention,

and

Jose Torres,
Plaintiff-in-Intervention-Appellant,

v.

Oakland Scavenger Company,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen, and Helpers
of America, Local No. 70,
Defendants-Appellees.

Case No. 85-2517* DC# CV-75-0060-CAL

Case No. 85-2903** DC# CV-75-0060-CAL

MEMORANDUM***

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge,
Presiding

*Argued and Submitted November 14, 1986

**Submitted November 14, 1986
San Francisco, California

Before: WRIGHT, SNEED, and TANG, Circuit Judges.

These two appeals pertain to an employment discrimination suit that is currently pending in federal district court, Martinez v. Oakland Scavenger Co., Civ. No. C-75-0060-CAL (N.D. Cal.). The district court denied appellant Ferro's motion to intervene because Ferro lacked a sufficient interest in the subject of the action. We affirm.

The district court entered summary judgment against appellant Torres because he failed to appeal after the court dismissed his complaint. Again we affirm.

The factual background is set out in Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1298-1300 (9th Cir. 1982), cert. denied, 467 U.S. 1251 (1984). . . .

II.

TORRES' APPEAL FROM SUMMARY JUDGMENT

We have jurisdiction over Torres' appeal from summary judgment under 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 54(b). The standard of review is de novo. Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 764 (9th Cir. 1986).

Torres was one of sixteen plaintiffs who intervened in the pending employment discrimination suit after the company settled with the original plaintiffs. The district court dismissed their com-

plaint, but they successfully appealed, Bonilla, 697 F.2d at 1297. Unfortunately, both the notice of appeal and this court's order of reversal and remand omitted Torres' name. The omission was due to clerical error on the part of a secretary employed by Torres' lawyer. Oakland Scavenger Company noted the omission in the brief it filed for the appeal. But Torres' attorney did nothing to cure the error until after the district court ordered summary judgment against Torres. Now it is too late.

Unless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him. Farley Transp. Co., Inc. v. Santa Fe Transp. Co., 778 F.2d 1365, 1368 (9th Cir. 1985).

Hence, the panel in Bonilla had no power to reverse the dismissal of the complaint with respect to Torres, and the district court properly concluded that the dis-

missal was final with respect to him. After the time for appeal has expired, the notice of appeal may not be amended to add additional parties. Trinidad Corp. v. Maru, 781 F.2d 1360, 1362 (9th Cir. 1986). Obviously, the time for amendment has passed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Perfecto Martinez, et al., Plaintiffs,
vs.

Oakland Scavenger Company, et al.,
Defendants.

Joaquin Morales Bonilla, et al.,
Plaintiffs-In-Intervention,
vs.

Oakland Scavenger Company, et al.,
Defendants.

Case No. C 75-0060 CAL

ORDER MODIFYING ORDER GRANTING SUMMARY
JUDGMENT AGAINST JOSE TORRES

Date: 11/1/85
Time: 9:30 a.m.
Room: 10

After due consideration of the previous order, the requirements of Rule 54(b) of the Federal Rules of Civil Procedure

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and the positions of the various parties in this matter,

IT IS ORDERED:

1. On September 6, 1985 this Court orally granted the motion of defendant Oakland Scavenger Company for summary judgment against the claims of plaintiff-in-intervention JOSE TORRES based upon TORRES' failure to file an appeal from the Order of Dismissal dated August 31, 1981. Subsequently, a written order putting into effect this Court's ruling was signed and filed. Attorneys for Mr. TORRES and for the defendant Oakland Scavenger Company seek modification of that order, Mr. TORRES so that the order can be immediately appealed and Oakland Scavenger Company so that the order does not appear to rule on whether Mr. TORRES can participate in this action as a member of a class, should one or more classes be certified in this action. In order to

clarify these matters, the order filed on September 19, 1985 regarding Mr. TORRES is set aside.

2. After full consideration of the arguments of the parties and the files and records of this action, the Court finds that Mr. TORRES did not appeal the previous judgment against him and therefore the motion against Mr. TORRES for summary judgment must be granted and this action must be dismissed as to Mr. TORRES. This order is intended to be a final judgment against Mr. TORRES, complying with Federal Rule of Civil Procedure 54(b). This Court finds that there is no just reason for delay in the finality of its ruling against Mr. TORRES and that he should be able to immediately appeal this ruling to determine whether he is a party to the instant action. Therefore, this Court expressly directs entry of judgment against Mr. TORRES alone.

3. Nothing in this order or any previous order is intended to depart from the statement in open court that the issue of whether Mr. TORRES can or cannot participate in this litigation as a member of a class, should a class be properly certified, has not been decided. This issue will be decided only after the parties have an opportunity to brief the matter and argue it before the court.

Dated: Oct 30 1985

CHARLES A. LEGGE
United States District Judge

APPROVED AS TO FORM:

Dated: October 23, 1985

KRAUSE, BASKIN, SHELL, GRANT
& BALLENTINE

By MARSHALL WARREN KRAUSE

Dated: October 24, 1985

MOORE, SIZOO, CANTWELL & McKAE
By CAROL A. MALENKA

Dated: October 25, 1985

BEESON, TAYER & SILBERT
By KENNETH N. SILBERT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Perfecto Martinez, et al., Plaintiffs,
and

Joaquin Morales Bonilla, et al.,
Plaintiffs in Intervention,

Jose Torres,
Plaintiff in Intervention/Appellant,

v.

Oakland Scavenger Company, et al.,
Defendants-Appellees.

Case No. 85-2903

ORDER

FILED

Feb 13 1987

Before: WRIGHT, SNEED, and TANG, Circuit
Judges.

The panel as constituted in the above
case has voted to deny the petition for re-

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hearing and to reject the suggestion for
rehearing en banc.

The full court has been advised of
the suggestion for en banc rehearing,
and no judge of the court has requested
a vote on the suggestion for rehearing
en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied,
and the suggestion for a rehearing en
banc is rejected.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Perfecto Martinez, Nolan Madden,
Eugenio Jiminez, Primitivo, et al.,
Plaintiffs,

and

John Ferro,
Applicant for Intervention-Aplt.,

Joaquin Morales Bonilla, et al.,
Plaintiffs-in-Intervention,

and

Jose Torres,
Plaintiff-in-Intervention-Aplt.,

vs.

Oakland Scavengers Company,
International Brotherhood of Teamsters,
Etc., Local #70
Defendants-Appellees.

No. 85-2517

No. 85-2903

DC CV 75-0060 CAL

FILED

Feb 26 1987

APPEAL from the United States District

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Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 11, 1986

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 81-4522
DC# CV-75-0060-CAL
Northern California

Perfecto Martinez, et al.,
Plaintiffs-Appellants,

Jose Torres,
Plaintiff in Intervention,

vs.

Oakland Scavenger Company, et al.,
Defendants-Appellees.

ORDER

Before: FARRIS, Circuit Judge

Plaintiff in intervention's "motion
for recall of mandate, amendment of notice
of appeal, and/or other appropriate re-
lief" is denied.

Filed: Apr. 14, 1986

JEROME FARRIS
United States Circuit Judge

APPENDIX F

PROVISIONS OF LAW INVOLVED

Title 42 U.S.C. § 1981, R.S. §1977,
provides:

All persons within the jurisdic-
tion of the United States shall have
the same right in every State and
Territory to make and enforce con-
tracts, to sue, be parties, give
evidence, and to the full and equal
benefits of all laws and proceedings
for the security of persons and
property as is enjoyed by white
citizens, and shall be subject to
like punishment, pains, penalties,
taxes, licenses, and exactions of
every kind, and to no other.

Title VII, § 703 of the Civil Rights
Act of 1964, 42 U.S.C. § 2000(e),
provides in pertinent part:

Definitions

(a) The term 'person' includes
one or more individuals, govern-
ments, governmental agencies,
political subdivisions, labor
unions, partnerships, associa-
tions, corporations, legal
representatives, mutual compan-
ies, joint-stock companies,
trusts, unincorporated organ-
izations, trustees, trustees
in cases under Title XI, or

receivers.

(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person,...

Section 701 (a), (b) 42 U.S.C. §

2000e(a), (b).

Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(a)(1), 42 U.S.C. §

2000e-2(a)(1), (2).

Rule 3(c), Federal Rules of Appellate Procedure provides in pertinent part:

(c) The notice of appeal shall specify the party or parties taking the appeal;...

Rule 61, Federal Rules of Civil

Procedure provides:

Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 10.4 of the the Rules of the Supreme Court of the United States provides in pertinent part:

All parties to the proceeding in the court from whose judgment the appeal is being taken

shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal.

OPPOSITION BRIEF

2
No. 86-1845

Supreme Court, U.S.
FILED

JUN 17 1987

JOSEPH F. SPANIOL, JR.
CLERK

**In The
Supreme Court of the United States**

October Term, 1986

—○—
JOSE TORRES,

Petitioner,

vs.

**OAKLAND SCAVENGER COMPANY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN, AND HELPERS OF
AMERICA, LOCAL NO. 70,**

Respondents.

—○—
**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

—○—
RESPONDENT'S BRIEF IN OPPOSITION

—○—
**STEPHEN MCKAE
HARDIN, COOK, LOPEZ,
ENGEL & BERGEZ
1999 Harrison Street,
18th Floor
Oakland, CA 94612-3508
Tel.: (415) 444-3131
On Behalf of Respondent
OAKLAND SCAVENGER
COMPANY**

QUESTIONS PRESENTED

Respondent OAKLAND SCAVENGER COMPANY respectfully disagrees with petitioner's questions presented for review and submits that the following are correctly the questions before the Supreme Court:

Was it reversible error for the district court to enter summary judgment against JOSE TORRES, one of sixteen intervening plaintiffs in the underlying action, when his counsel failed to include his name in a notice of appeal from a judgment of dismissal entered against all plaintiffs on August 31, 1981, and when he did not seek relief in the Court of Appeals from the failure to do so until after summary judgment was entered on September 17, 1985, despite knowledge of the omission, and even though the 1981 judgment of dismissal was ultimately reversed as to the remaining parties?

Is the denial by the Court of Appeals on April 14, 1986 of the petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief reviewable by the United States Supreme Court upon a petition for *certiorari*, and if it is reviewable, is this petition untimely because it was not filed within ninety days of that denial?

If the Appellate Court's denial on April 14, 1986 of petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief is reviewable by the United States Supreme Court, and if it is timely filed, was it reversible error for the Court of Appeals to deny petitioner's motion for recall of the mandate and

amendment of the notice of appeal after the district court entered summary judgment against petitioner for failing to file a notice of appeal from the judgment of dismissal entered August 31, 1981?

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No. 86-1845

In The
Supreme Court of the United States
October Term, 1986

JOSE TORRES,

Petitioner,

vs.

OAKLAND SCAVENGER COMPANY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN, AND HELPERS OF
AMERICA, LOCAL NO. 70,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

Respondent OAKLAND SCAVENGER COMPANY respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 11, 1986, and the ensuing judgment of the Court of Appeals entered on February 26, 1987.

PROVISIONS OF LAW INVOLVED

This case involves Rule 3(c), Rule 4(a)(1), and Rule 4(a)(5) of the Federal Rules of Appellate Procedure, the pertinent provisions of which are set forth in Appendix A.

STATEMENT OF THE CASE

JOSE TORRES was granted leave to intervene as a plaintiff in the case of *Martinez v. Oakland Scavenger Company* on October 24, 1980. That action arose upon a complaint of discrimination in employment on account of race and national origin under Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000(e) *et seq.* The district court granted defendants' motion under Rule 12(b)(6), F. Rules Civ. Proc., to dismiss the action on August 31, 1981. The amended complaint contained class allegations under Rule 23, F. Rules Civ. Proc., but a class had not been certified when the action was dismissed.

A notice of appeal was filed on September 29, 1981 in which the individual plaintiffs taking the appeal were specified. (Clerk's Record, p. 98.) JOSE TORRES was not named in the caption or in the body of the appeal. TORRES was also not listed in the required certification under Ninth Circuit Rule 13(b)(3) as to parties having an interest in the outcome of the appeal.

Respondent OAKLAND SCAVENGER COMPANY observed the omission of JOSE TORRES from plaintiff's notice of appeal and brought this matter to plaintiff's

and the Court's attention in footnote 3 of its opening brief filed in February, 1982. Counsel for TORRES had not made a timely motion in the district court under Rule 4(a)(5), F. Rules App. Proc., which permits late filing of a notice of appeal due to a showing of "excusable neglect or good cause," and, despite knowledge of the omission of TORRES' name, counsel did not seek leave to amend the notice of appeal from the Court of Appeals. This failure to bring a motion to correct the notice of appeal was deliberate inaction. (Petition, page 13.) Additionally, TORRES' counsel waited for more than three years after the appellate court's decision before seeking a recall of that mandate in order to amend the notice of appeal to include TORRES.

The Court reversed the district court's decision on November 9, 1982 and remanded. On remand, respondent filed a motion for summary judgment dismissing the action as to JOSE TORRES on the ground that the prior judgment of dismissal was final as to him by virtue of his failure to appeal. The district court granted the motion on September 17, 1985 and entered judgment against TORRES. TORRES then appealed this summary judgment dismissal and also, on March 26, 1986, filed a motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief. The Court of Appeals denied the motion on April 14, 1986 and affirmed the district court's summary judgment against TORRES in an opinion entered on December 11, 1986. TORRES' petition for rehearing and suggestion for rehearing *en banc* were denied in an order filed February 13, 1987, and the Court of Appeals entered its judgment on February 26, 1987

affirming the district court's judgment. TORRES is now petitioning this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The district court dismissed, and the appellate court affirmed the dismissal of, petitioner JOSE TORRES as a plaintiff in the underlying action because he failed to file a notice of appeal from the district court judgment of dismissal in that underlying action. The absence of petitioner's name from the notice of appeal cannot be claimed to be an oversight because petitioner's counsel chose not to request an opportunity to amend the notice even after the omission of petitioner's name was brought to his attention. This omission is not a harmless error which can be readily disregarded, because the rights of the respondent would be substantially affected by the need for a new trial if petitioner becomes a party to the proceedings at this late date. Furthermore, the petition for writ of certiorari was not filed within ninety days following the April 14, 1986 denial of petitioner's motion for recall of the mandate.

The issues in this case are not of great federal or national importance; the case involves only several procedural rules, none of which are newly enacted, and none of which are in direct conflict with each other.

A. THE APPELLATE COURT WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF JOSE TORRES AS A PLAINTIFF BECAUSE HE FAILED TO FILE A NOTICE OF APPEAL FROM THE JUDGMENT OF DISMISSAL ENTERED ON AUGUST 31, 1981.

The jurisdictional defect in this case is due to the fact that petitioner's counsel failed to specify JOSE TORRES as a party taking the prior appeal and then did nothing about it when the omission was called to his attention. Rule 3(c), F. Rules App. Proc., requires in part that "the notice of appeal shall specify the party or parties taking the appeal." This serves to inform the other parties as to who intends to appeal. Timely filing of the notice of appeal is jurisdictional; and the appeal cannot be amended to include additional parties after the time limit has expired. *Cook and Sons Equipment, Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960).

Where more than one party intends to appeal, each must be specified on the notice of appeal. The term "*et al.*" does not inform the other parties who is appealing and is therefore not appropriate. *Van Hoose v. Eidson*, 450 F.2d 746, 747 (6th Cir. 1971). In cases involving multi-party litigation, appellants must include and name individual plaintiffs who are appealing. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 356 (3d Cir. 1974).

B. FAILURE TO NAME JOSE TORRES IN THE NOTICE OF APPEAL WAS NOT EXCUSABLE OVERSIGHT WHEN PLAINTIFF'S COUNSEL MADE A DELIBERATE DECISION NOT TO REQUEST AN OPPORTUNITY TO CORRECT THE NOTICE.

Petitioner contends that the omission of JOSE TORRES from the notice of appeal was an oversight. However, after the omission was noted in OAKLAND SCAVENGER COMPANY'S opening brief, TORRES' counsel decided to take no action to correct the notice. (Petition, page 13.) In the ensuing three years before the summary judgment which is the subject of this petition, TORRES' counsel did not move for relief under Rule 4(a)(5), F. Rules App. Proc., even after OAKLAND SCAVENGER COMPANY advised the district court, in a status conference statement filed March 4, 1985, that it would seek summary judgment against JOSE TORRES on these grounds. (Clerk's Record, p. 125.) Rule 4(a)(5) states that the district court can, "upon a showing of excusable neglect or good cause," extend the time for filing the notice of appeal, upon motion filed not later than thirty days after the date of judgment.

The district court had no power to grant relief to the petitioner because petitioner had missed the time extension within which he might have filed a corrected notice of appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure. In *Harrison v. United States*, 715 F.2d 1311 (8th Cir. 1983), the Court of Appeals said that a district court lacked jurisdiction to amend a notice of appeal to include an omitted party's name. Consistent with that decision, the district court in this case did the

only thing it could, and granted the motion for summary judgment against JOSE TORRES. In the transcript of the oral proceedings on the motion for summary judgment in the district court, the court stated that it did "not have the power to correct" the notice, and summary judgment must be entered because the correction of the error was not within the "inherent power" of the court. (Reporter's Transcript, September 6, 1985, page 5.)

The Court of Appeals also did not have authority to amend the notice of appeal to bring in additional parties. In *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365 (9th Cir. 1985), the district court had entered summary judgment against the plaintiffs, who appealed, but only one plaintiff's name was listed on the notice of appeal. The Court of Appeals for the Ninth Circuit stated that the court did "not have jurisdiction to consider (the omitted party) Farley Terminal's claim because it failed to file a rule 3(c) notice of appeal." *Id.* at 1370. The court in *Farley* dismissed the appeal citing Rules 3(a) and 4(a), F. Rules App. Proc., under which the filing of a notice of appeal within the thirty-day period specified by rule 4(a)(5) is "mandatory and jurisdictional." *Id.* at 1368.

In unusual circumstances, the court will allow the notice of appeal to be amended to include the omitted party. While the district court cannot grant relief, the Court of Appeals can recall its mandate upon a motion to recall, and order amendment of the timely notice of appeal in "rare" situations involving clerical errors. *Harrison v. United States*, *supra*, 715 F.2d 1311. Petitioner cites *Harrison v. United States* and would have the Court apply

such an exception in this case. In *Harrison*, a party was not named in the notice of appeal, and after remand the party realized the error and filed a motion to reopen the case and amend the notice of appeal. The omission of the party was due to clerical error, and none of the parties knew of the mistake or used it to their advantage. The Appellate Court recalled the mandate and allowed amendment of the notice of appeal. The present case can be distinguished because both parties were aware of the omission of JOSE TORRES' name from the notice of appeal and defendant OAKLAND SCAVENGER COMPANY had indicated in its brief on appeal that it did not consider TORRES a party to the appeal. Therefore, the rare exception applied in *Harrison* does not apply here.

In another exception, *Williams v. Frey*, 551 F.2d 932 (3d Cir. 1977), the court allowed the notice of appeal to be amended in the Court of Appeals because appellees had considered the omitted parties to be participating at all stages of the appeal. The present case can be distinguished again because respondent made it clear in its brief that JOSE TORRES was not considered to be an appellant.

The petitioner cites this Court's opinion in *Foman v. Davis*, 371 U.S. 178 (1962), as eschewing the "strict view" of interpreting the Federal Rules of Civil Procedure. While agreeing with this Court's assertion in *Foman* that it is "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities," *id.* at 181, the Ninth Circuit has put that assertion into perspective and said:

This does not mean that failure to comply with the rules is of no consequence merely because [the failure] does not mislead or prejudice the other party. Adopting a purely "equitable" approach to applying the rules would result in unpredictability and defeat the purpose of the rules, which is to promote the orderly resolution of disputes and to discourage dilatory practices. . . . A literal interpretation of rule 3(c) creates a bright-line distinction and avoids the need to determine which parties are actually before the court long after the notice of appeal has been filed.

Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1369 (9th Cir. 1985). Additionally, contrary to petitioner's belief, the Ninth Circuit in *Farley* saw no conflict between Rule 3(c) of the Federal Rules of Appellate Procedure and Rule 10.4 of the Rules of the Supreme Court. It is only when the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit are silent as to a particular matter of appellate practice that the relevant rule of the Supreme Court is applied. Since Rule 3(c) of the Federal Rules of Appellate Procedure specifies that the parties taking the appeal must be listed on the notice, the Supreme Court's Rule 10.4 does not apply here. *Id.* at 1369-1370.

In *Foman*, the petitioner filed a notice of appeal from a judgment of the district court, and within ten days filed a separate second notice of appeal from a denial of a motion in that same court. The Court of Appeals found that the first notice of appeal was premature in view of a pending motion to vacate the judgment, and thus of no effect. It then found that the second notice of appeal was ineffective to review the judgment because the notice failed to specify that the appeal was being taken from that judg-

ment as well as from the orders denying the motions. This Court held that the Court of Appeals was in error in so narrowly reading the second notice. Having both notices of appeal before it, the Court of Appeals "should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Id.* at 181. The Court acknowledged that not only was petitioner's intention to seek review of both the judgment and the denial of the motions manifest, but also that *both* parties briefed and argued the merits of the earlier judgment on appeal, indicating that both parties perceived the second appeal to include the judgment as well as the denial of motions.

This is different from the present case in that here respondent OAKLAND SCAVENGER COMPANY pointed out to petitioner that TORRES had been omitted from the notice of appeal and that TORRES was not considered by respondent as a party to the appeal. In addition, the present case is concerned with the *parties* to an appeal, and as such deals directly with a number of unique jurisdictional questions; *Foman*, on the other hand, was concerned with the judgment or order appealed from, and did not address the jurisdictional issues associated with the specification of the parties on appeal.

Trinidad Corp. v. Maru, 781 F.2d 1360 (9th Cir. 1986), cited by petitioner, is similar to *Foman*. In *Trinidad*, the appellant filed a notice of appeal while a timely motion to vacate the district court judgment was pending. After the motion to vacate was denied and the district court judgment was final, appellant filed a second amended notice of appeal. The court noted that the first notice of

appeal was filed prematurely, and thus was of no effect, and that the second amended notice of appeal was also technically void: "Similarly, a notice of appeal that is void at the outset cannot by amendment become anything other than void." *Id.* at 1362. However, the Court decided that, since the second amended notice had been filed after the final judgment, and was therefore timely if viewed as an original notice of appeal, the Court would consider the second amended notice as a "mis-styled" form of a notice of appeal. In *Trinidad*, the appellants had tried to correct their error by amending the notice, and the Court of Appeals recognized this in transforming the second amended notice, as written, into the required notice of appeal. However, the Court strongly cautioned counsel to avoid this practice in the future, and maintained that the "effect of a notice of appeal is determined at the time it is filed. The notice cannot be amended to add additional parties as appellants after the time for appeal has expired." *Id.* at 1362. In the present case, the petitioner did not attempt to correct the omission in a timely manner by amending the notice of appeal within the time period specified.

Petitioner cites without discussion several other cases in which "exceptional circumstances" have led to the permission of an unnamed party to be included in an appeal. (Petition, pp. 24-25.) Those cases, which relaxed compliance with Rule 3(c) for specific reasons, are not in direct conflict with this case and other Ninth Circuit cases because the "exceptional circumstances" in each of those cases are not present here.

C. THE OMISSION OF TORRES' NAME FROM THE NOTICE OF APPEAL DOES NOT CONSTITUTE HARMLESS ERROR, AND THE DOCTRINE OF HARMLESS ERROR DOES NOT APPLY TO THE FAILURE TO NAME PARTIES IN A NOTICE OF APPEAL.

Petitioner discusses the doctrine of harmless error, and asserts that there is no sound reason why the doctrine should not apply to appellate proceedings. (Petition, page 32.) Presumably, petitioner would invoke the doctrine in this case by claiming that the omission of TORRES' name from the notice of appeal was mere harmless error, and ask the courts to disregard the omission and add TORRES' name to the names of the parties taking the appeal. But the harmless error doctrine applies only when disregarding the error "does not affect the substantial rights of the parties." Rule 61, F. Rules Civ. Proc. Here, the underlying action has already been tried, and the trial encompassed over twenty-five actual trial days spanning over four months in duration. The rights of respondent would be substantially affected by the need for a new trial if TORRES becomes a party to the proceedings at this late date.

Furthermore, the doctrine of harmless error does not apply in this case, where a name has been omitted from a notice of appeal. "Only the parties named in the notice of appeal are brought within the appellate court's jurisdiction The harmless error doctrine has no application to failure to name parties in a notice of appeal." *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, *supra*, 778 F.2d 1365, at 1368-1369, citing *Cook and Sons Equipment, Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960), at 609.

D. IF THE APPELLATE COURT'S DENIAL ON APRIL 14, 1986 OF THE PETITIONER'S MOTION FOR RECALL OF MANDATE WAS REVIEWABLE THEN BY THE UNITED STATES SUPREME COURT, THIS PETITION IS UNTIMELY BECAUSE IT WAS NOT FILED WITHIN NINETY DAYS OF THAT DENIAL.

On March 26, 1986, petitioner filed a motion in the Court of Appeals for recall of mandate, amendment of notice of appeal, and/or other appropriate relief, which motion was denied on April 14, 1986. Although authority is sparse for the proposition that this specific denial was reviewable by the Supreme Court, the Supreme Court's *certiorari* jurisdiction over cases coming from the federal courts of appeals is plenary. 28 U.S.C.S. § 1254(1). If this denial was ever reviewable upon a petition for writ of *certiorari*, petitioner should have filed the petition within ninety days of the denial date. Rule 20.4, Rev. Rules U.S. Sup. Ct. Since this petition was not filed within the ninety-day time allowance after the appellate court's denial of petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief, this petition is not timely filed with respect to those issues, and as it relates to them, it should be denied.

E. ACCORDING TO THE DOCTRINE OF RES JUDICATA, THE MOTION FOR SUMMARY JUDGMENT GRANTED AGAINST JOSE TORRES BARS HIM FROM RECOVERY AS AN INDIVIDUAL OR AS A CLASS MEMBER.

Summary judgment against JOSE TORRES was granted the second time on September 17, 1985. Class cer-

tification in this case was granted on February 18, 1986. (Clerk's Record, p. 279.) The subsequent class certification cannot relieve appellant from the bar of the prior judgment.

The doctrine of *res judicata* makes a judgment, once rendered, the full measure of relief to be accorded between the same parties on the same claim or cause of action. 18 Wright and Miller, *Federal Practice and Procedure*, § 4402, page 7 (2d ed. 1983). JOSE TORRES is barred by the judgment against him from any recovery in the underlying action. TORRES' claim for relief is the same claim raised by the other plaintiffs in this case. Class action preclusion is subject to all the requirements that apply to issue and claim preclusion in individual actions. *Id.* at § 4455, page 473.

The decision in district court for summary judgment was valid, it was final, and it was on the merits. Judgments entered through summary judgments "clearly constitute dispositions on the merits" (Wright, § 4428, page 271), and put an end to the cause of action. A judgment on the merits is an absolute bar to subsequent action between the same parties. *White v. Colgan Elec. Co., Inc.*, 781 F.2d 1214 (6th Cir. 1986). Consequently, JOSE TORRES cannot participate as a class member in the ongoing action against OAKLAND SCAVENGER COMPANY.

CONCLUSION

The district court was required to grant the motion for summary judgment against JOSE TORRES. The failure to correct the notice of appeal was not an oversight, by counsel's admission, so there is no basis for relief under Rule 4(a)(5), F. Rules App. Proc. Petitioner's counsel deliberately chose not to amend the notice of appeal from the time he learned of the omission in 1982, until now, after summary judgment has been rendered a second time. There is no direct conflict between this Ninth Circuit case and cases in other Circuits regarding Rule 3(c) of the Federal Rules of Appellate Procedure because the exceptional circumstances controlling those cases are not present here. According to the doctrine of *res judicata*, JOSE TORRES is now barred from further relief in this case, as a named party or class member. For these reasons, OAKLAND SCAVENGER COMPANY respectfully requests the Court to deny the petition for a writ of certiorari.

DATED: June 12, 1987.

Respectfully submitted,

HARDIN, COOK, LOPER, ENGEL
& BERGEZ

BY: STEPHEN MCKAE
Counsel of Record on Behalf of
Respondent OAKLAND
SCAVENGER CO.

APPENDIX

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Rule 10.4 of the Revised Rules of the Supreme Court of the United States provides, in pertinent part:

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal.

Rule 3(c) of the Federal Rules of Appellate Procedure provides, in pertinent part:

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part:

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure provides:

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance

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with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 61 of the Federal Rules of Civil Procedure provides:

Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

JOINT APPENDIX

3

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH E. SPANIEL, JR.
CLERK

No. 86-1845

**In The
Supreme Court of the United States**

October Term, 1987

— o —
JOSE TORRES,

Petitioner,

vs.

**OAKLAND SCAVENGER COMPANY,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
and HELPERS OF AMERICA, LOCAL NO. 70,**

Respondents.

— o —
**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

— o —
JOINT APPENDIX

— o —
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Petition for Certiorari filed May 13, 1987
Certiorari granted October 13, 1987
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1981

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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-75-0060 AJZ

PERFECTO MARTINEZ, NOLAN)
 MADDEN, EUGENIO JIMENEZ,)
 PRIMITIVO GUZMAN, R. L.)
 JENKINS, individually and on)
 behalf of all others similarly)
 situated,)

Plaintiffs,) No.

vs.)

OAKLAND SCAVENGER COM-) CIVIL RIGHTS
 PANY, INTERNATIONAL) COMPLAINT
 BROTHERHOOD OF TEAM-)
 STERS, CHAUFFEURS, WARE-)
 HOUSEMEN, AND HELPERS OF)
 AMERICA, LOCAL NO. 70,)

Defendants.)

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1343 (4), 2201. This is a suit authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000c, et seq.) and the Civil Rights Act of 1866 (42 U.S.C. Section 1981). The Court also has jurisdiction under the doctrine of fair representation (29 U.S.C. Section 151 et seq.). This is also a proceeding for a declaratory judgment as to rights established under such legislation.

PARTIES

1. Plaintiff, PERFECTO MARTINEZ is a spanish surname employee of OAKLAND SCAVENGER COMPANY and a dues paying member of TEAMSTERS LOCAL # 70 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS. He is a citizen of the United States, and a resident of Oakland, California.

2. Plaintiff, NOLAN MADDEN, was a black employee of OAKLAND SCAVENGER COMPANY and a member of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL # 70 until April of 1972. He is a citizen of the United States, and a resident of Oakland, California.

3. EUGENIO JIMENEZ is a spanish surname employee of OAKLAND SCAVENGER COMPANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL # 70. He is a citizen of the United States, and a resident of Oakland, California.

4. Plaintiff, PRIMITIVO GUZMAN, is a spanish surname employee of OAKLAND SCAVENGER COM-

PANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL # 70. He is a citizen of the United States, and a resident of Oakland, California.

5. Plaintiff, R. L. JENKINS, is a black employee of OAKLAND SCAVENGER COMPANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL # 70. He is a citizen of the United States, and a resident of Oakland, California.

6. Defendant, OAKLAND SCAVENGER COMPANY, is a corporation with its principal place of business in Oakland, California. It is engaged in an industry of affecting commerce and employ more than twenty-five (25) persons. OAKLAND SCAVENGER COMPANY is an employer within the meaning of 42 U.S.C. Section 2000e(b).

7. Defendant, INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL # 70 is a "labor organization" engaged in an industry affecting commerce, which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment. It is a labor organization within the meaning of 42 U.S.C. Section 2000e(d) and 2000e(e).

CLASS ACTION

1. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all Black and Spanish Surname employees and past employees of OAKLAND SCAVENGER COMPANY, who have suffered from the dis-

criminatory practices alleged in this complaint, including Black and Spanish Surname employees. The class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; the plaintiffs will fairly and adequately protect the interests of the class. Defendants, and each of them, have acted on grounds generally applicable to the class, thereby making appropriate injunctive and corresponding declaratory relief with respect to the class as a whole.

COUNT I

A. *PLAINTIFFS, PERFECTO MARTINEZ, NOLAN MADDEN, EUGENIO JIMENEZ, PRIMITIVO GUZMAN and R. L. JENKINS.*

1. Plaintiffs above mentioned were and are employed as scavengers for OAKLAND SCAVENGER COMPANY. During the years of their employment, they have requested and earned, but never received, a promotion or a raise above the two lowest pay categories. After years of working for OAKLAND SCAVENGER COMPANY, they are still not allowed above the most menial job levels. They are certain that this situation occurred and continues to occur, because of their race and national origin. Black and Spanish Surname employees (hereinafter, sometimes collectively called, including plaintiffs, minority employees) working for OAKLAND SCAVENGER COMPANY and are kept in the same low job/pay classifications and are prevented from obtaining supervisory positions or from higher paying positions of driving scavenger trucks, regardless of seniority or qualifications. White

employees having other than Spanish Surnames (hereinafter referred to as favored employees) hired long after plaintiffs and other minority employees, get a higher pay schedule for the same job, as well as supervisory or driving positions. Minority employees are systematically assigned to the most undesirable jobs and work schedules, as are plaintiffs above mentioned.

2. Plaintiffs above mentioned have been excluded because of their race and national origin from buying shares of stock in OAKLAND SCAVENGER COMPANY. The stock of defendant company is and has been only available to favored employees of OAKLAND SCAVENGER COMPANY. Not being allowed to purchase said shares, plaintiffs have been, and continue to be, deprived of sharing in profits of OAKLAND SCAVENGER COMPANY; have been deprived of substantial capital gains in the value of said stock; and have been deprived of a vote in the policy of OAKLAND SCAVENGER COMPANY. The practice of OAKLAND SCAVENGER COMPANY of selling shares of stock only to favored employees has further tended to deprive plaintiffs above mentioned of equal employment opportunities.

3. Plaintiffs above mentioned are dues-paying members of TEAMSTERS LOCAL # 70 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS. OAKLAND SCAVENGER COMPANY has discriminatory hiring and promotion practices which have resulted in the work forces of OAKLAND SCAVENGER CORPORATION having no Black or Spanish Surname employees above the "helper" job category. Because of the fact that INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL # 70, is composed solely of the workers

from the OAKLAND SCAVENGER COMPANY, and the OAKLAND SCAVENGER COMPANY employs discriminatory hiring practices, the majority of the members of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL # 70 is composed of white employees having other than Spanish Surnames who are also share holders of OAKLAND SCAVENGER COMPANY. This situation has deprived plaintiffs and other minority employees from holding Union offices and from getting proper Union representation.

4. Due to the above discriminatory practices, plaintiffs above mentioned, and other minority employees, have in the past, and unless this Court acts, will be deprived in the future, of acceptable, favorable and fair work contracts. As a result of the union being controlled by white non spanish surname share holders of OAKLAND SCAVENGER COMPANY, grievances of minority employees are not properly processed, and minority employees are not fairly represented by the LOCAL UNION.

5. Defendants intentional acts, policies, and practices alleged above limit, segregate, classify and otherwise discriminate against plaintiffs', deprive or tend to deprive them of employment opportunities; and adversely affect their status as employees because of their race in violation of Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a).

6. All plaintiffs have filed charges with the California Fair Employment Practices Commission (the "FEPC") and the Federal Equal Employment Opportunity Commission (the "Commission"), alleging continuing violations of their rights and the rights of the class

they represent under the applicable fair employment legislation. The FEPC has terminated its proceedings and the Commission issued Notices to Plaintiffs, NOLAN MADDEN, EUGENIO JIMENEZ, PRIMITIVO GUZMAN and R. L. JENKINS on November 20, 1974 and to PERFECTO MARTINEZ on November 25, 1974, advising them of their right to institute a civil action in Federal District Court within 90 days after such Notice was provided in Title VII of the Civil Rights Act of 1964. (See Exhibit A)

COUNT II

1. Plaintiff NOLAN MADDEN was an employee of OAKLAND SCAVENGER COMPANY for fifteen (15) years. During that time he always worked in the position of "helper" and never achieved a greater job position in spite of longer seniority and adequate ability for better paying jobs. Since the beginning of his employment by defendant, plaintiff MADDEN has been the object of continuing harassment and other discriminatory acts by defendant. He has continuously protested the discriminatory practices towards black and spanish surnamed employees. He has complained to the management that out of approximately 665 employees there were only approximately 50 blacks. That out of a total of 15 office workers there was only one black working in the office. His main protest was that the company would not allow black and spanish surnamed employees to drive the garbage trucks. Only whites were allowed to drive. Plaintiff MADDEN further complained that all promotions were done on the basis of family relationship, friendship, and race rather than on ability or seniority. As a result of the complaints by plaintiff MADDEN of the various employment practices, plaintiff MADDEN was discharged from his job on April

4, 1972. Feeling that his discharge was related to his protesting of discriminatory practices by defendant company, plaintiff MADDEN filed a formal complaint with defendant's LOCAL UNION # 70 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS. Although a hearing was scheduled on this matter, when plaintiff MADDEN appeared for the hearing he was told that it had been cancelled. He had received no prior notification of the cancellation from the Union and thereafter found that the Union was unwilling to pursue his complaint. Plaintiff MADDEN complained further and another hearing was scheduled. At this hearing the Union representative appeared to be representing the defendant OAKLAND SCAVENGER COMPANY rather than MR. MADDEN. No questions were asked as to charges against plaintiff MADDEN and a fair hearing was not had on the matter.

2. Plaintiff MADDEN further realleges all of the facts in connection with his cause of action which were alleged in Count I of this complaint.

3. Plaintiff NOLAN MADDEN complains that the above practices during the term of his employment deprived him of just wages and work conditions, and that defendants, and each of them, are, and have been, maintaining a discriminatory system which is continuing in nature. That such continuing discriminatory system is not isolated to one instance, but is a general pattern and practice that continues. This discriminatory system has deprived this plaintiff of equal pay for equal work in the past due to racial discrimination by defendants, and has presently deprived plaintiff MADDEN of his occupation as an employee of the OAKLAND SCAVENGER COMPANY and also of the benefits of being a shareholder or sharing in

the continued income of OAKLAND SCAVENGER COMPANY or of the capital gain which would accrue thereon and also, pension benefits which he would have maintained if he had not been fired because of his stand against defendant OAKLAND SCAVENGER COMPANY's discriminatory practices.

4. Defendants intentional acts, policies and practices alleged above limit, segregate, classify and otherwise discriminate against plaintiff; they have deprived him of an employment opportunity, shareholding and pension rights, and adversely affect his status as a job seeker, all because of his race in violation of Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-2(a).

5. Plaintiff NOLAN MADDEN has filed charges with the California Fair Employment Practices Commission (FEPC) and the Federal Equal Employment Opportunity Commission ("the Commission") alleging a violation of his rights and the rights of the class he represents under the applicable fair employment legislation. The FEPC has terminated its proceedings and the Commission issued a Notice to plaintiff MADDEN on November 20, 1974, advising him of his right to institute a Civil Action in Federal District Court within 90 days after such notice as provided in Title VII of the Civil Rights Act of 1964. (See Exhibit B)

GENERAL PATTERNS OF DISCRIMINATION

1. The discriminatory pattern complained of by all plaintiffs above mentioned in COUNT I and COUNT II are illustrative of a pervasive pattern of racial discrimination conducted by OAKLAND SCAVENGER CORPORATION

and TEAMSTERS LOCAL # 70. Minority employees are relegated to relatively menial and low paying positions, although white non spanish surname employees are promoted to and occupy better paying positions. On information and belief, plaintiffs allege that over the years the percentage of non whites and the minorities to which they belong, hired by defendant, OAKLAND SCAVENGER COMPANY, is far below the percentage that such minorities constitute in the work force available in the Bay Area of San Francisco. Moreover, minority employees are relegated to relatively menial and low paying positions, and favored employees are promoted to and occupy better and more responsible positions, without regard to seniority or ability. A principal obstacle to achievement of equal opportunity by minority employees is the fact that supervisors of defendants business are 100 percent white non spanish surname employees, and are given virtually unlimited discretion as to the employment opportunities of all those subject to their supervision.

2. Plaintiffs further allege on information and belief that over the years there have been a large number of vacancies and promotional opportunities for which minority employees were qualified, but which they were not permitted to obtain. As a result, minorities have been completely excluded from supervisory and management positions at defendants' business.

3. Plaintiffs further allege that minority employees are also discriminated against by being assigned to and permitted to work in only certain job classifications, at menial and low paying jobs.

4. As a result of the discriminatory practices alleged above, minority employees have been almost completely

excluded from higher pay positions with defendant, OAKLAND SCAVENGER COMPANY. As of December, 1974, out of a total of 665 employees, defendant company has:

- a. No Black or Spanish Surname officials or managers.
- b. No Black or Spanish Surname drivers or managers.
- c. No Black or Spanish Surname Union officials.
- d. Only one Black above the position of helper and otherwise no Black or Spanish Surname persons in a position of "driver". (this paragraph crossed out in original)

5. Defendants intentional acts, policies and practices alleged herein limit, segregate, classify and otherwise discriminate against plaintiffs and the class they represent; deprive or tend to deprive them and the class they represent of employment opportunities, and adversely affect their status as employees because of their race, in violation of Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(a)) the Civil Rights Act of 1866 (42 U.S.C. Section 1981), and plaintiffs right to fair representation (29 U.S.C., 151 et seq.).

6. Defendants acts, policies and practices constitute continuing violations of the rights of plaintiffs and other minority employees of defendants as herein alleged.

COUNT III

1. The allegations of all paragraphs contained in the headings, JURISDICTION, PARTIES, CLASS ACTION,

COUNT I, COUNT II and GENERAL PATTERNS OF DISCRIMINATION above are repeated and realleged as though fully set forth herein.

2. The acts, policies and practices of defendants alleged herein, deprive plaintiffs, and the class they represent, because of their race, of their equal right to make and enforce employment contracts in violation of 42 U.S.C. Section 1981.

COUNT IV

The allegations of all paragraphs contained in the headings, JURISDICTION, PARTIES, CLASS ACTIONS, COUNT I, COUNT II, COUNT III and GENERAL PATTERNS OF DISCRIMINATION above are repeated and realleged as though fully set forth herein.

2. The conduct of the defendant LOCAL UNION # 70 complained of violated the duty of fair representation owed to plaintiffs, under 29 U.S.C. Section 151, et seq.

COUNT V

1. The allegations of all paragraphs contained in the headings, JURISDICTION, PARTIES, CLASS ACTION, COUNT I, COUNT II, COUNT III, COUNT IV, and GENERAL PATTERNS OF DISCRIMINATION above are repeated and realleged as though fully set forth herein.

2. The acts, policies, and practices of defendants alleged herein were done willfully and intentionally and maliciously with intent to inflict harm on plaintiffs and to deprive them and the class they represent, because of

their race, of their civil rights, and to damage them in this respect and financially, all of which entitles plaintiffs and the class they represent to punitive damages, by way of example against defendants.

BASIS FOR EQUITABLE RELIEF

1. Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from defendants unlawful practices. Plaintiffs and the class they represent are now suffering, and will continue to suffer irreparable injury from defendants' intentional acts, policies and practices set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment granting plaintiffs:

(a) A declaratory judgment that defendants' acts, policies and practices complained of herein violate the rights of plaintiffs and the class they represent secured by Title VII of the Civil Rights Act of 1964 and by the Civil Rights Act of 1899 and plaintiffs right to fair representation (29 U.S.C. Section 151, et seq.)

(b) An injunction enjoining defendants, their agents, employees, attorney and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, bridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs and members of the class

plaintiffs represent to enjoy equal employment and union opportunities as secured by Title VII of the Civil Rights Act of 1964 and by the Civil Rights Act of 1866.

(c) An injunction enjoining defendants, their agents, employees, attorneys and those acting in concert with them and at their direction from depriving plaintiffs and the members of the class plaintiffs present, of opportunities for employment and promotional opportunities to better paying and more responsible positions, and subjecting plaintiffs to action which restrict them to relatively menial and low paying positions.

(d) An injunction requiring defendant union to take affirmative action to require a new union election for union officers that will not be tainted by the discriminatory schemes of defendants.

(e) An injunction requiring defendants to take affirmative action to remedy the denial of equal employment to plaintiffs and to members of the class plaintiffs represent.

(f) An award of back pay to plaintiffs and all members of the class plaintiffs represent and for the losses of pay and pensions they have suffered as a result of the defendants' unlawful employment practices.

(g) An injunction requiring defendant OAKLAND SCAVENGER COMPANY to take affirmative action to redistribute shares of stock in said company to plaintiffs and to members of their class on an equitable basis, commensurate with length of employment, as compared to favored employees and to reimburse plaintiffs for any

financial loss they have incurred because defendants have denied them the right to buy shares.

(h) Exemplary and punitive damages in the amount of Ten Million Dollars (\$10,000,000.00).

(i) Plaintiffs cost of suit including reasonable attorneys fees.

(j) Such other and further relief as the Court may deem just and proper.

**GUNHEIM, YTURBIDE, ROSE, JOHNS
& WINTHER**

By: _____

ERIC C. SCHNEIDER

(Certificate of Service Omitted)

EXHIBIT A
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

(Seal)

FOX PLAZA
San Francisco District Office
1390 Market Street, Suite 325
San Francisco, California 94102
Telephone (415-556-0260)

CERTIFIED MAIL NO. 878338

(Filed November 20, 1974)

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: Nolden Madden v. Oakland Scavenger Co. & IBT,
Local # 70
Charge No. TSF2-1211

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Nolden Madden, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further —Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the

complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman
District Office Attorney

Enclosure: Right to Sue Letter

cc: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621 w RTS.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

NOTICE OF RIGHT TO SUE

TO: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: [] No Reasonable Cause, [] No Jurisdiction, [] Untimely Charge, [] Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF2-1211.

[X] Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in

the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California

IBT, Local # 70
70 Hegenburger Road
Oakland, California

Eric Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

(Seal)

FOX PLAZA

San Francisco District Office
1390 Market Street, Suite 325
San Francisco, California 94102
Telephone (415-556-0260)

CERTIFIED MAIL NO. 878335

(Filed November 20, 1974)

Eric Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: Eugenio Jimenez v. Oakland Scavenger Co. & IBT,
Local # 70
Charge No. TSF4-1389

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Eugenio Jimenez, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of

the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman
District Office Attorney

Enclosure: Right to Sue Letter.

cc: Eugenio Jimenez, 1511 13th Avenue, Oakland, California 94601/w RTS.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

NOTICE OF RIGHT TO SUE

TO: Eugenio Jimenez, 1511 - 13th Avenue, Oakland, California 94601.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, Ca. 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause, ☐ No Jurisdiction, ☐ Untimely Charge, ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF4-1389.

☒ Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the

United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California
IBT, Local # 70
10 Hegenburger Road
Oakland, California
Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

(Seal)

FOX PLAZA

San Francisco District Office
1390 Market Street, Suite 325
San Francisco, California 94102
Telephone (415-556-0260)

CERTIFIED MAIL NO. 878341
(Filed November 20, 1974)

Eric Schneider, Esq.
1231 Market Street
San Francisco, California

RE: Primitivo Guzman v. Oakland Scavenger Co. & IBT,
Local # 70 Charge No. TSF4-1391

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Primitivo Guzman, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceeding will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding their right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman
District Office Attorney

Enclosure: Right to Sue Letter.

cc: Primitivo Guzman, 1803—33rd Avenue,
Oakland, California
94601/w RTS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

To: Primitivo Guzman, 1808—33rd Avenue, Oakland,
California 94601.

From: EEOC: San Francisco District Office, 1390
Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following
reason: ☐ No Reasonable Cause, ☐ No Jurisdiction,
☐ Untimely Charge, ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF4-1391.

☒ Charging Party's Attorney requested a Right to
Sue in writing.

If you want to pursue your charge further, you have the
right to sue the respondent(s) named in this case in the
United States District Court for the area where you live.
If you decide to sue, you must do so within ninety (90)
days from the receipt of this Notice; otherwise your right
is lost.

If you do not have a lawyer or are unable to obtain the
services of a lawyer, take this Notice to the United States
District Court which may, in its discretion, appoint a law-
yer to represent you.

An information copy of this Notice has been sent to the
respondent(s) named in this case.

If you have any questions about your legal rights or need
help in filing your case in court, call the EEOC repre-
sentative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Company
2601 Peralta Street
Oakland, California
IBT, Local # 70
70 Hegenburger Road
Oakland, California
Eric Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

(Seal)

FOX PLAZA

San Francisco District Office
1390 Market Street, Suite 325
San Francisco, California 94102
Telephone (415-556-0260)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878332

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: R.L. Jenkins v. Oakland Scavenger Co. & IBT, Local
70 Charge No. TSF5-0711

Dear Attorney Schneider:

In accordance with your request on behalf of your client, R.L. Jenkins, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety

days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings. Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman
District Office Attorney
Enclosure: Right to Sue Letter.

cc: R.L. Jenkins, 5924 Grove Street, Oakland, California/
WRTS.

(Seal)

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Fox Plaza**

San Francisco District Office
1390 Market Street, Suite 325
San Francisco, California 94102
Telephone (415-556-0260)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878332

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: R.L. Jenkins v. Oakland Scavenger Co. & IBT, Local
70 Charge No. TSF5-0711

Dear Attorney Schneider:

This is in response to your recent letter requesting issuance of a statutory notice of right to sue in the above-captioned case.

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended, provides for issuance of such notice upon dismissal of a charge by the Commission or upon the expiration of 180 days from filing where the Commission has not filed a civil action or entered into a conciliation agreement to which the person aggrieved is a party.

However, because of the very large backlog of charges pending in this office, the Commission will not be able to reach the subject charge for investigation, nor file suit, nor enter into a conciliation agreement within the 180 day period. We do not believe Congress intended to delay the right of aggrieved persons to file suit under such circumstances. Accordingly, we are honoring your request and hereby issue a notice of right to sue.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case.

Sincerely,

/s/ Sherry Gendelman
District Office Counsel

Encl: Right to Sue.

cc: R.L. Jenkins, 5924 Grove Street, Oakland, California

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

To: R. L. Jenkins, 5924 Grove Street, Oakland, California.

From: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California, 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge

☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF5-0711

☒ Charging Party's Attorney requested Right to Sue Letter in writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Company
2601 Peralta Street
Oakland, Ca.

IBT, Local #70
70 Hegenburger Road
Oakland, California

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

(Seal)

FOX PLAZA

**SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)**

CERTIFIED MAIL NO. 878357

Eric C. Schneider, Atty.
Gunheim, Yturbide, Rose, Johns & Winther
1231 Market St.
San Francisco 94103

(Filed November 25, 1974)

**RE: TSF4-1388 Perfecto Martinez v. Oakland Scavenger
Co., et al.**

Dear Mr. Schneider:

In accordance with your request on behalf of your client, Perfecto Martinez, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring

suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman

District Office Attorney

Enclosure: Right to Sue Letter.

cc: Perfecto Martinez, 2318 E. 15 St., Oakland 94606
w/RTS letter.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

NOTICE OF RIGHT TO SUE

TO: Perfecto Martinez, 2318 E. 15th Street, Oakland, Calif. 94606.

FROM: Equal Employment Opportunity Commission, San Francisco District Office, 1390 Market St., Suite 325, San Francisco, Ca. 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge ☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466

Case/Charge Number: TSF4-1388

☒ Charging Party's Attorney requested a Right to Sue Letter.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the

United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta St.
Oakland, Ca.

and

Eric C. Schneider, Atty. at Law
1231 Market St.
San Francisco 94103

IBT, Chauffeurs, Whsmn & Hlprs
of America, Local 70
70 Hegenburger Rd.
Oakland, Ca.

EXHIBIT B

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325

SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)

(Filed November 20th, 1974)

CERTIFIED MAIL NO. 878338

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: Nolden Madden v. Oakland Scavenger Co. & IBT,
Local #70, Charge No. TSF2-1211

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Nolden Madden, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 20 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ Sherry Gendelman
District Office Attorney

Enclosure: Right to Sue Letter

cc: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621, w/RTS.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

NOTICE OF RIGHT TO SUE

TO: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge ☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415)556-7466.

Case/Charge Number: TSF2-1911.

☒ Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ Fred D. Brooks, Jr.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California

IBT, Local #70
70 Hegenburger Road
Oakland, California

Eric Schneider, Esq.
1231 Market Street
San Francisco, California 94103

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)
)
)
) No. c-75-0060 AJZ
)
) (Filed July 17, 1975)
)
) FIRST AMENDED
) CIVIL RIGHTS
) COMPLAINT
)
) (Case title omitted
) in printing)
)
)
)
)
)
)

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1343 (4), 2201. This is a suit authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C., Section 2000e, et seq.) and the Civil Rights Act of 1866 (42 U.S.C. Section 1981). The Court also has jurisdiction under the doctrine of fair representation (29 U.S.C. Section 151 et seq.). This is also a proceeding for a declaratory judgment as to rights established under such legislation.

PARTIES

1. Plaintiff, PERFECTO MARTINEZ is a Spanish surnamed employee of OAKLAND SCAVENGER COM-

PANY and a dues paying member of TEAMSTERS LOCAL #70 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS. He is a citizen of the United States, and a resident of Oakland, California.

2. Plaintiff, NOLAN MADDEN, was a black employee of OAKLAND SCAVENGER COMPANY and a member of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #70 until April of 1972. He is a citizen of the United States, and a resident of Oakland, California.

3. EGENIO JIMENEZ is a Spanish surnamed employee of OAKLAND SCAVENGER COMPANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #70. He is a citizen of the United States, and a resident of Oakland, California.

4. Plaintiff, PRIMITIVO GUZMAN, is a Spanish surnamed employee of OAKLAND SCAVENGER COMPANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #70. He is a citizen of the United States, and a resident of Oakland, California.

5. Plaintiff, R. L. JENKINS, is a black employee of OAKLAND SCAVENGER COMPANY and a member of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #70. He is a citizen of the United States, and resident of Oakland, California.

6. Defendant, OAKLAND SCAVENGER COMPANY, is a corporation with its principal place of business in Oakland, California. It is engaged in an industry of affecting commerce and employs more than twenty-five

(25) persons. OAKLAND SCAVENGER COMPANY is an employer within the meaning of 42 U.S.C. Section 2000e(b).

7. Defendant, INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL #70 is a "labor organization" engaged in an industry affecting commerce, which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment. It is a labor organization within the meaning of 42 U.S.C. Section 2000e(d) and 2000e(e).

8. All of the holders of shares of the OAKLAND SCAVENGER COMPANY have not been joined by plaintiffs as defendants under Rules of Court 19(a) because their absence does not preclude complete relief among those already parties and the disposition of the action in their absence will not, as a practical matter, impede or impair their ability to protect their interests nor will it leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of any claimed interest.

CLASS ACTION

1. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all persons who have been denied or will in the future be denied equal employment opportunities from the discriminatory practices alleged in this complaint, including black and Spanish surname employees. The class is so numerous that joinder of all members is impractical; there are questions of law and

fact common to the class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class the plaintiffs will fairly and adequately protect the interests of the class. Defendants, and each of them, have acted on grounds generally applicable to the class, thereby making appropriate injunctive and corresponding declaratory relief with respect to the class as a whole.

COUNT I

A. PLAINTIFFS PERFECTO MARTINEZ, EUGENIO JIMENEZ, PRIMITIVO GUZMAN and R. L. JENKINS

1. Plaintiffs above mentioned were and are employed as scavengers for OAKLAND SCAVENGER COMPANY. During the years of their employment, they have requested and earned, but never received, a promotion or a raise above the two lowest pay categories. After years of working for OAKLAND SCAVENGER COMPANY, they are still not allowed above the most menial job levels. They are certain that this situation occurred and continues to occur, because of their race and national origin. Black and Spanish Surname employees (hereinafter, sometimes collectively called, including plaintiffs, minority employees) working for OAKLAND SCAVENGER COMPANY are kept in the same low job/pay classifications and are prevented from obtaining supervisory positions or from higher paying positions of driving scavenger trucks, regardless of seniority or qualifications. White employees having other than Spanish Surnames (hereinafter referred to as favored employees) hired long after plaintiffs and other minority employees, get a higher pay schedule for the same job, as well as supervisory or

driving positions. Minority employees are systematically assigned to the most undesirable jobs and work schedules, as are plaintiffs above mentioned.

2. Plaintiffs above mentioned have been excluded because of their race and national origin from buying shares of stock in OAKLAND SCAVENGER COMPANY. The stock of defendant company is and has been only available to favored employees of OAKLAND SCAVENGER COMPANY. Not being allowed to purchase said shares, plaintiffs have been, and continue to be, deprived of sharing in profits of OAKLAND SCAVENGER COMPANY; have been deprived of substantial capital gains in the value of said stock; and have been deprived of a vote in the policy of OAKLAND SCAVENGER COMPANY. The practice of OAKLAND SCAVENGER COMPANY of selling shares of stock only to favored employees has further tended to deprive plaintiffs above mentioned of equal employment opportunities.

3. Plaintiffs above mentioned are dues-paying members of TEAMSTERS LOCAL #70 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS. OAKLAND SCAVENGER COMPANY has discriminatory hiring and promotion practices which have resulted in the work forces of OAKLAND SCAVENGER CORPORATION having no Black or Spanish Surname employees above the "helper" job category. Because of the fact that INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #70, is composed solely of the workers from the OAKLAND SCAVENGER COMPANY, and the OAKLAND SCAVENGER COMPANY employs discriminatory hiring practices, the majority of the members

of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL #70 is composed of white employees having other than Spanish Surnames who are also shareholders of OAKLAND SCAVENGER COMPANY. This situation has deprived plaintiffs and other minority employees from holding Union offices and from getting proper Union representation.

4. Due to the above discriminatory practices, plaintiffs above mentioned, and other minority employees, having in the past, and unless this Court acts, will be deprived in the future, of acceptable, favorable and fair work contracts. As a result of the Union being controlled by white non Spanish surname shareholders of OAKLAND SCAVENGER COMPANY, grievances of minority employees are not properly processed, and minority employees are not fairly represented by the LOCAL UNION.

5. Defendants' intentional acts, policies, and practices alleged above limit, segregate, classify and otherwise discriminated against plaintiffs, deprive or tend to deprive them of employment opportunities; and adversely affect their status as employees because of their race in violation of Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a).

6. All plaintiffs have filed charges with the California Fair Employment Practices Commission (the "FEPC") and the Federal Equal Employment Opportunity Commission (the "Commission"), alleging continuing violations of their rights and the rights of the class they represent under the applicable fair employment legislation. The FEPC has terminated its proceedings and the Commission issued Notices to Plaintiffs, EUGENIO

JIMENEZ, PRIMITIVO GUZMAN and R. L. JENKINS, on November 20, 1974 and to PERFECTO MARTINEZ on November 25, 1974, advising them of their right to institute a civil action in Federal District Court within 90 days after such notice was provided in Title VII of the Civil Rights Act of 1964. (See Exhibit "A")

7. The acts, policies, and practices of defendants' set forth in Count I were done willfully, intentionally and maliciously, with the intent to inflict harm on plaintiffs and to deprive them and the class they represent, because of their race or national origin, of their civil rights, and damage them in this respect and financially, all of which entitles plaintiffs and the class they represent to punitive damages by way of example against defendants.

COUNT II

1. Plaintiff, NOLAN MADDEN was an employee of OAKLAND SCAVENGER COMPANY and a member of defendant UNION for fifteen (15) years. During that time he always worked in the position of "helper" and never achieved a greater job position in spite of longer seniority and adequate ability for better paying jobs. Since the beginning of his employment by defendant, plaintiff MADDEN was the object of continuing harassment and other discriminatory acts by defendant company. He has continuously protested the discriminatory practices towards black and Spanish surnamed employees. He has complained to the management that out of approximately 665 employees there were only approximately 50 blacks. That out of a total of 15 office workers there was only one black working in the office. His main protest was that the company would not allow black and

Spanish surnamed employees to drive the garbage trucks. Only whites were allowed to drive. Plaintiff MADDEN further complained that all promotions were done on the basis of family relationship, friendship, and race rather than on ability or seniority. As a result of the complaints by plaintiff MADDEN of the various employment practices, plaintiff MADDEN was discharged from his job on April 1972. Feeling that his discharge was related to his protesting of discriminatory practices by defendant company, plaintiff MADDEN filed a formal complaint with defendant LOCAL UNION #70 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS. Although a hearing was scheduled on this matter, when plaintiff MADDEN appeared for the hearing he was told that it had been cancelled. He had received no prior notification of the cancellation from the UNION and thereafter found that the UNION was unwilling to pursue his complaint. Plaintiff MADDEN complained further and another hearing was scheduled. At this hearing the UNION representative appeared to be representing the defendant OAKLAND SCAVENGER COMPANY rather than MR. MADDEN. No questions were asked as to charges against plaintiff MADDEN and a fair hearing was not had on the matter.

2. Plaintiff MADDEN further realleges all of the facts in connection with his cause of action which were alleged in Count I of this complaint, to have occurred to him while he was employed by defendant company and a member of defendant UNION.

3. Plaintiff NOLAN MADDEN complains that the above practices during the term of his employment de-

prived him of just wages and work conditions, and that defendants, and each of them, are, and have been, maintaining a discriminatory system which is continuing in nature. That such continuing discriminatory system has deprived this plaintiff of equal pay for equal work in the past due to racial discrimination by defendants, and has presently deprived plaintiff MADDEN of his occupation as an employee of the OAKLAND SCAVENGER COMPANY and also of the benefits of being a shareholder or sharing in the continued income of OAKLAND SCAVENGER COMPANY or of the capital gain which would accrue thereon and also, pension benefits which he would have maintained if he had not been fired because of his stand against defendant OAKLAND SCAVENGER COMPANY'S discriminatory practices.

4. Defendants' intentional acts, policies and practices alleged above limit, segregate, classify and otherwise discriminate against plaintiff; they have deprived him of an employment opportunity, shareholding and pension rights, and adversely affect his status as a job seeker, all because of his race in violation of Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-2(a).

5. Plaintiff NOLAN MADDEN has filed charges with the California Fair Employment Practices Commission (FEPC) and the Federal Equal Employment Opportunity Commission (the "Commission") alleging a violation of his rights and the rights of the class he represents under the applicable fair employment legislation. The FEPC has terminated its proceedings and the Commission issued a Notice to plaintiff MADDEN on November 20,

1974, advising him of his right to institute a Civil Action in Federal District Court within 90 days after such notice was provided in Title VII of the Civil Rights Act of 1964. (See Exhibit "B")

6. The acts, policies and practices of defendants' set forth in Count II were done willfully, intentionally, and maliciously, with the intent to inflict harm on plaintiff and to deprive him and the class he represents, because of their race or national origin, of their civil rights, and to damage them in this respect, and financially, all of which entitles plaintiff, and the class he represents to punitive damages by way of example against defendants.

GENERAL PATTERNS OF DISCRIMINATION

1. The discriminatory pattern complained of by all plaintiffs above mentioned in Count I and Count II are illustrative of a pervasive pattern of racial discrimination conducted by OAKLAND SCAVENGER COMPANY and TEAMSTERS LOCAL #70. Minority employees are relegated to relatively menial and low paying positions, although white non Spanish surname employees are promoted to and occupy better paying positions. On information and belief, plaintiffs, allege that over the years the percentage of non whites and the minorities to which they belong, hired by defendant, OAKLAND SCAVENGER COMPANY, is far below the percentage that such minorities constitute in the work force available in the San Francisco Bay Area. Moreover, minority employees are relegated to relatively menial and low paying positions, and favored employees are promoted to and occupy better and more responsible positions, without regard to seniority or ability. A principal obstacle to achievement of equal op-

portunity by minority employees is the fact that supervisors of defendants business are 100 percent white non Spanish surname employees, and are given virtually unlimited discretion as to the employment opportunities of all those subject to their supervision.

2. Plaintiffs further allege on information and belief that over the years there have been a large number of vacancies and promotional opportunities for which minority employees were qualified, but which they were not permitted to obtain. As a result, minorities have been completely excluded from supervisory and management positions at defendants business.

3. Plaintiffs further allege that minority employees are also discriminated against by being assigned to and permitted to work in only certain job classifications, at menial and low paying jobs.

4. As a result of the discriminatory practices alleged above, minority employees have been almost completely excluded from higher pay positions with defendant, OAKLAND SCAVENGER COMPANY. As of December, 1974, out of a total of 665 employees, defendant company has:

a. No Black or Spanish Surname officials or managers.

b. No Black or Spanish Surname drivers or managers.

5. Defendants' intentional acts, policies and practices alleged herein limit, segregate, classify and otherwise discriminate against plaintiffs and the class they represent; deprive or tend to deprive them and the class

they represent of employment opportunities, and adversely affect their status as employees because of their race, in violation of Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000-e-2(a)) the Civil Rights Act of 1866 (42 U.S.C. Section 1981), and plaintiffs right to fair representation (29 U.S.C., 151 et seq.).

6. Defendants' acts, policies and practices constitute continuing violations of the rights of plaintiffs and other minority employees of defendants as herein alleged.

COUNT III

1. The allegations of all paragraphs contained in the headings, JURISDICTION, PARTIES, CLASS ACTION, COUNT I, COUNT II and GENERAL PATTERNS OF DISCRIMINATION above are repeated and realleged as though fully set forth herein.

2. The acts, policies and practices of defendants alleged herein, deprive plaintiffs, and the class they represent, because of their race, of their equal right to make and enforce employment contracts in violation of 42 U.S.C. Section 1981.

3. The acts, policies and practices of defendants set forth in COUNT III were done willfully, intentionally and maliciously, with the intent to inflict harm on plaintiffs, and to deprive them and the class they represent, because of their race or national origin, of their civil rights, and to damage them in this respect and financially, all of which entitles plaintiffs, and the class they represent, to punitive damages by way of example against defendants.

COUNT IV

1. The allegations of all paragraphs contained in the headings, JURISDICTION, PARTIES, CLASS ACTIONS, COUNT I, COUNT II, COUNT III and GENERAL PATTERNS OF DISCRIMINATION above are repeated and realleged as though fully set forth herein.

2. The conduct of the defendant LOCAL UNION #70 complained of violated the duty of fair representation owed to plaintiffs, under 29 U.S.C. Section 151, et seq.

3. The acts, policies, and practices of defendant Union alleged herein were done willfully and intentionally and maliciously with intent to inflict harm on plaintiffs and to deprive them, and the class they represent, because of their race, of their right to fair representation, and to damage them in this respect and financially, all of which entitles plaintiffs and the class they represent to punitive damages, by way of example against defendant Union.

BASIS FOR EQUITABLE RELIEF

1. Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from defendants unlawful practices. Plaintiffs and the class they represent are now suffering, and will continue to suffer irreparable injury from defendants' intentional acts, policies and practices set forth herein.

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment granting plaintiffs:

(a) A declaratory judgment that defendants' acts, policies and practices complained of herein violate the rights of plaintiffs and the class they represent secured by Title VII of the Civil Rights Act of 1964 and by the Civil Rights Act of 1866 and plaintiffs right to fair representation (29 U.S.C. Section 151, et seq.).

(b) An injunction enjoining defendants, their agents, employees, attorney and those acting in concert with them and at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs and members of the class plaintiffs represent to enjoy equal employment and union opportunities as secured by Title VII of the Civil Rights Act of 1964 and by the Civil Rights Act of 1866.

(c) An injunction enjoining defendants, their agents, employees, attorneys and those acting in concert with them and at their direction from depriving plaintiffs and the members of the class plaintiffs represent, of opportunities for employment and promotional opportunities to better paying and more responsible positions, and subjecting plaintiffs to action which restrict them to relatively menial and low paying positions.

(d) An injunction requiring defendants to take affirmative action to remedy the denial of equal employment to plaintiffs and to members of the class plaintiffs represent.

(e) An award of back pay to plaintiffs and all members of the class plaintiffs represent and for the

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WILL BE ISSUED.

losses of pay and pensions they have suffered as a result of the defendants' unlawful employment practices.

(f) For compensatory damages for loss of capital gains and other benefits resulting from the unlawful exclusionary practices of the defendants concerning the ownership of shares of stock.

(g) Exemplary and punitive damages in the amount of Ten Million Dollars (\$10,000,000.00).

(h) Plaintiffs cost of suit including reasonable attorney's fees.

(i) Such other and further relief as the Court may deem just and proper.

GUNHEIM, YTURBIDE, ROSE, JOHNS
& WINTHER

/s/ By: ERIC C. SCHNEIDER

(Certificate of service omitted)

EXHIBIT A

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA**

**SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)**

(Filed November 20, 1974)

(SEAL)

CERTIFIED MAIL NO. 878332
Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

RE: Nolden Madden v. Oakland Scavenger Co. & IBT,
Local #70 Charge No. TSF2-1211

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Nolden Madden, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (e) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
District Office Attorney

Enclosure: Right to Sue Letter

cc: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621 w RTS.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

NOTICE OF RIGHT TO SUE

TO: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge

[] No Jurisdiction [] Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF2-1211.

[X] Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost. If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California

IBT, Local #70
70 Hegenburger Road
Oakland, California

Erie Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Co.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)

(SEAL)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878332

Erie C. Schneider, Esq.

1231 Market Street

San Francisco, California 94103

RE: Eugenio Jimenez v. Oakland Scavenger Co. & IBT,
Local #70 Charge No. TSF4-1389

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Eugenio Jimenez, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings. Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
District Office Attorney
Enclosure: Right to Sue Letter.

cc: Eugenio Jimenez, 1511 13th Avenue, Oakland, California 94601 w/RTS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

TO: Eugenio Jimenez, 1511 - 13th Avenue, Oakland, California 94601.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, Ca. 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge ☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.
Telephone Number: (415) 556-7466.
Case/Charge Number: TSF4-1389.

☒ Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California
IBT, Local #70
70 Hegenburger Road
Oakland, California
Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)

(Filed November 20, 1974)

(SEAL)

CERTIFIED MAIL NO. 878332
Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California

RE: Primitivo Guzman v. Oakland Scavenger Co. & IBT,
Local #70 Charge No. TSF4-1391

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Primitivo Guzman, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (e) (as amended), you are hereby notified that you may institute a civil action under

Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
District Office Attorney

Enclosure: Right to Sue Letter.

cc: Primitivo Guzman, 1808 - 33rd Avenue, Oakland, California 94601/w RTS.

NOTICE OF RIGHT TO SUE

TO: Primitivo Guzman, 1808 33rd Avenue, Oakland, California 94601.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge

☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF4-1391.

☒ Charging Party's Attorney requested a Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California

IBT, Local #70
70 Hegenburger Road
Oakland, California

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
TELEPHONE (415-556-0260)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878332
 Eric C. Schneider, Esq.
 1231 Market Street
 San Francisco, California 94103
 (SEAL)

RE: R.L. Jenkins v. Oakland Scavenger Co. & IBT, Local
 #70 Charge No. TSF5-0711

Dear Attorney Schneider:

In accordance with your request on behalf of your client, R.L. Jenkins, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings. Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
 District Office Attorney

Enclosure: Right to Sue Letter.

cc: R.L. Jenkins, 5924 Grove Street, Oakland, California/
 WRTS.

EQUAL EMPLOYMENT OPPORTUNITY
 COMMISSION
 FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
 1390 MARKET STREET, SUITE 325
 SAN FRANCISCO, CALIFORNIA 94102
 TELEPHONE (415-556-0260)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878332
 Eric C. Schneider, Esq.
 1231 Market Street
 San Francisco, California 94103
 (SEAL)

RE: R.L. Jenkins v. Oakland Scavenger Co & IBT, Local
 #70 Charge No. TSF5-0711

Dear Attorney Schneider:

This is in response to your recent letter requesting issuance of a statutory notice of right to sue in the above-captioned case.

Section 706(f) (1) of Title VII of the Civil Rights Act of 1964 as amended, provides for issuance of such notice upon dismissal of a charge by the Commission or upon the expiration of 180 days from filing where the Commission has not filed a civil action or entered into a conciliation agreement to which the person aggrieved is a party.

However, because of the very large backlog of charges pending in this office, the Commission will not be able to reach the subject charge for investigation, nor file suit, nor enter into a conciliation agreement within the 180 day period. We do not believe Congress intended to delay the right of aggrieved persons to file suit under such circumstances. Accordingly, we are honoring your request and hereby issue a notice of right to sue.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case.

Sincerely,

/s/ SHERRY GENDELMAN
District Office Counsel

Encl: Right to Sue.

cc: R.L. Jenkins, 5924 Grove Street, Oakland, California

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

NOTICE OF RIGHT TO SUE

TO: R.L. Jenkins, 5924 Grove Street, Oakland, California.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge
☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.
Telephone Number: (415) 556-7466.
Case/Charge Number: TSF5-0711.

[X] Charging Party's Attorney requested Right to Sue Letter in writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States Dis-

trict Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, Ca.

IBT, Local #70
70 Hegenburger Road
Oakland, California

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA**

**SAN FRANCISCO DISTRICT OFFICE
1390 MARKET STREET, SUITE 325
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415-556-0260)**

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878357

Eric C. Schneider, Atty.
Gunheim, Yturbide, Rose, Johns & Winther
1231 Market Street
San Francisco, California 94103

(SEAL)

RE: TSF4-1388 Perfecto Martinez v. Oakland Scavenger Co., et al.

Dear Mr. Schneider:

In accordance with your request on behalf of your client, Perfecto Martinez, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (e) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
District Office Attorney

Enclosure: Right to Sue Letter.

cc: Perfecto Martinez, 2318 E. 15 St., Oakland 94606 w/
RTS letter.

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NOTICE OF RIGHT TO SUE**

Perfecto Martinez, 2318 E. 15 St., Oakland, Calif. 94606

FROM: Equal Employment Opportunity Commission, San Francisco District Office, 1390 Market St., Suite 325, San Francisco, Ca. 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge

☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF4-1388.

☒ Charging Party's Attorney requested a Right to Sue Letter.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, Ca.

and

Eric C. Schneider, Atty. at Law
1231 Market Street
San Francisco, California 94103

IBT, Chauffeurs, Whsmn & Hlprs of America, Local 70
70 Hegenburger Road
Oakland, Ca.

EXHIBIT B
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
FOX PLAZA

SAN FRANCISCO DISTRICT OFFICE
 1390 MARKET STREET, SUITE 325
 SAN FRANCISCO, CALIFORNIA 94102
 TELEPHONE: (415-556-0260)

(Filed November 20, 1974)

CERTIFIED MAIL NO. 878338

Eric C. Schneider, Esq.

1231 Market Street

San Francisco, California 94103

RE: Nolden Madden v. Oakland Scavenger Co. & IBT,
 Local #70 Charge No. TSF2-1211

Dear Attorney Schneider:

In accordance with your request on behalf of your client, Nolden Madden, made pursuant to Commission Procedural Rules 29 CFR 1601.25a (c) (as amended), you are hereby notified that you may institute a civil action under Section 706(f)1 of Title VII of the Civil Rights Act of 1964 in the appropriate Federal District Court within ninety days of the receipt of this letter. Failure to bring suit within this prescribed period may result in the loss of your right to seek judicial relief under Title VII.

Further Commission proceedings will be suspended unless, within 20 days, pursuant to the Commission's Procedural Rules 29 CFR 1601.25b (d) (as amended), this office receives a written request that the Commission continue to process the case. Please send me a copy of the complaint when it is filed and a copy of all subsequent pleadings.

Should you have any questions regarding your right to sue, please contact me at the above address.

Sincerely,

/s/ SHERRY GENDELMAN
 District Office Attorney

Enclosure: Right to Sue Letter

cc: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621 w RTS.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

NOTICE OF RIGHT TO SUE

TO: Nolden Madden, 5541 Harvey Avenue, Oakland, California 94621.

FROM: EEOC, San Francisco District Office, 1390 Market Street, Suite 325, San Francisco, California 94102.

This charge has been dismissed for the following reason: ☐ No Reasonable Cause ☐ Untimely Charge

☐ No Jurisdiction ☐ Failure to Proceed.

EEOC Representative: Sherry Gendelman.

Telephone Number: (415) 556-7466.

Case/Charge Number: TSF2-1211.

☒ Charging Party's Attorney requested Right to Sue in Writing.

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ FRED D. BROOKS, JR.
Acting District Director

cc: Oakland Scavenger Co.
2601 Peralta Street
Oakland, California

IBT, Local #70
70 Hegenburger Road
Oakland, California

Eric C. Schneider, Esq.
1231 Market Street
San Francisco, California 94103

Charging Party's Copy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Case title omitted
in printing)

NO. C-75-0060 AJZ

ANSWER OF
DEFENDANT
LOCAL 70 TO
FIRST AMENDED
COMPLAINT

INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA LOCAL NO. 70 answers the
First Amended Complaint in the above-entitled case as
follows:

I.

Answering the allegations contained in Paragraph I of
"Jurisdiction" it is denied that this Court has jurisdiction
for the reasons stated in the affirmative defenses of the
First Amended Complaint, *infra*.

II.

Answering the allegations contained under the heading
"Parties" Paragraphs 1, 2, 3, 4, 5, 6, and 7 are admitted.
Answering the allegations contained in Paragraph 8, it is
admitted that the shareholders have not been joined as de-
fendants in this lawsuit; the remaining allegations in said
Paragraph are denied.

III.

The allegations contained in Paragraph 1 under "Class Action" are denied.

IV.

The allegations contained under "Count I" are answered as follows:

1. It is admitted that all plaintiffs with the exception of NOLAN MADDEN are employed by Oakland Scavenger Company. With respect to the remaining allegations of said Paragraph, defendant Local 70 is without sufficient information or belief to know whether Oakland Scavenger Company has discriminated against said Plaintiffs as alleged, and on that ground denies said allegations. Defendant Local 70 alleges that it is not responsible for any discrimination against plaintiffs which is therein described.

2. Defendant Local 70 is without sufficient information or belief to answer the allegations contained in Paragraph 2, and on that ground said allegations are denied.

3. Answering the allegations contained in Paragraph 3, it is admitted that all plaintiffs with the exception of Nolan Madden are members of Teamsters Local 70. Defendant Local 70 is without sufficient knowledge or belief to know whether Oakland Scavenger Company has discriminatory hiring and promotion practices, and on that ground said allegations are denied. The allegations relating to the membership of Local 70 (page 5, lines 4-13) are denied. Further answering said allegations, it is alleged that the membership of Local 70 consists of approximately 8,000 employees working for a very large number of employers in a variety of industries, and that the member-

ship of Local 70 employed by Oakland Scavenger Company is a very small portion of Local 70's entire membership.

4. The allegations contained in Paragraphs 4 and 5 are denied.

5. Defendant Teamsters Local 70 is without sufficient information or belief to answer the allegations contained in Paragraph 6 and on that ground said allegations are denied.

6. The allegations contained in Paragraph 7 are denied.

V.

The allegations contained under the heading "Count II" are answered as follows:

1. Defendant Teamsters Local 70 is without sufficient information or belief to answer the allegations contained in Paragraph 1, (page 6, line 17-page 7, line 2), and on that ground said allegations are denied. It is admitted Madden was discharged by Oakland Scavenger Company in April 1972, and that a grievance was processed by Local 70 in consequence of said discharge. The allegations relating to the handling of said grievance (page 7, lines 8-18) are denied. Further answering said allegations, it is alleged that Defendant Local 70 handled the grievance in a fair and just manner, and without discrimination against plaintiff Madden.

2. The allegations incorporated by reference in Paragraph 2 are answered in the same form and substance as previously answered with respect to the Paragraphs in "Count I" which are therein referred to.

3. Answering the allegations contained in Paragraph 3, Defendant Local 70 is without sufficient information or belief with respect to such allegations as they apply to Oakland Scavenger Company and on that ground said allegations are denied. Insofar as said allegations relate to Defendant Local 70 they are denied.

4. The allegations contained in Paragraph are denied.

5. Defendant Local 70 is without sufficient information or belief to answer the allegations contained in Paragraph 5, and on that ground said allegations are denied.

6. The allegations contained in Paragraph 6 are denied.

VI.

The allegations contained under the heading "General Patterns of Discrimination" are answered as follows:

1. Defendant Local 70 is without information or belief as to the allegations in Paragraph 1 insofar as they apply to Oakland Scavenger Company, and on that ground said allegations are denied. Insofar as said allegations relate to Local 70, they are denied.

2. The allegations contained in Paragraphs 2, 3 and 4 relate solely to Oakland Scavenger Company, and Local 70 is without sufficient information or belief with respect thereto, and on that ground denies said allegations.

3. The allegations contained in Paragraphs 5 and 6 are denied.

VII.

The allegations contained in "Count III" are answered as follows:

1. The allegations incorporated by reference in Paragraph 1 are answered in the same form and substance as the answers heretofore given to the same allegations in the paragraphs referred to therein.

2. The allegations contained in Paragraphs 2 and 3 are denied.

VIII.

The allegations under the heading "Count IV" are answered as follows:

1. The allegations incorporated by reference in Paragraph 1 are answered in the same form and substance as heretofore with respect to the same allegations in the paragraphs referred to therein.

2. The allegations contained in Paragraphs 2 and 3 are denied.

IX.

The allegations contained in Paragraph 1 under the heading "Basis for Equitable Relief" are denied.

• • •

For its first separate and affirmative defense, it is alleged that the Court is without jurisdiction under 42 U.S.C. 2000-5(e) on the ground that it does not appear in the First Amended Complaint that plaintiffs have exhausted their remedies before the Equal Employment Opportunity Commission in that: (a) it has not been shown that said Commission conducted an investigation into the charges filed with it by plaintiffs; (b) it has not been shown that said Commission has attempted to conciliate

the charges filed with it by plaintiffs; (c) it has not been shown that the "Right to Sue Letters" were not issued prior to the expiration of the time period during which said Commission is required to consider and determine charges before it; and (d) it appears that the "Right to Sue Letters" were issued by a subordinate official of the said Commission who does not have legal authority to take such action.

• • •

For its second separate and affirmative defense defendant Local 70 alleges that the Court is without jurisdiction with respect to plaintiff Nolan Madden on the ground that it is not shown that charges were filed by Madden with the Equal Employment Opportunity Commission within the limitation period provided by 42 U.S.C. Section 2000-5(e).

• • •

For its third separate and affirmative defense, it is alleged that the First Amended Complaint fails to state a claim upon which relief may be granted, for the same reasons heretofore stated in the first and second affirmative defense.

• • •

For its fourth separate and affirmative defense, it is alleged that the First Amended Complaint fails to state a claim upon which relief may be granted insofar as it alleges discrimination against plaintiffs with respect to the issuance and distribution of shares of stock in Oakland Scavenger Company, on the ground that neither Title VII of the Civil Rights Act of 1964 nor Title 42 U.S.C. Section

1981 prohibit discrimination with respect to this subject matter.

• • •

For its fifth separate and affirmative defense, it is alleged that the First Amended Complaint fails to state a claim upon which relief may be granted as to Local 70 insofar as it alleges discrimination against plaintiffs with respect to the issuance and distribution of shares of stock in Oakland Scavenger Company, on the ground that Local 70 has no control or proprietary interest with respect to the ownership of Oakland Scavenger Company and has no responsibility for the subject matter of said allegations.

WHEREFORE, it is respectfully submitted that the plaintiffs take nothing by their First Amended Complaint and that said Complaint be dismissed in its entirety with costs of this proceeding and attorneys' fees awarded to Defendant Local 70.

Dated: July 25, 1975

BRUNDAGE, BEESON,
TAYER & KOVACH

By: /s/ Duane B. Beeson
Attorneys for Defendant
Local 70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Case title omitted
in printing)

)
) No. C-75-0060 AJZ
)
) ANSWER OF
) DEFENDANT
) OAKLAND
) SCAVENGER
) TO FIRST
) AMENDED CIVIL
) RIGHTS
) COMPLAINT

NOW comes defendant OAKLAND SCAVENGER COMPANY and for answer to plaintiffs' first amended complaint herein admits, denies and avers as follows:

I.

Answering the allegations of that part of the first amended complaint under the heading identified as "Jurisdiction," page 1, lines 21 through 29, this defendant denies each and every allegation thereof.

II.

Answering paragraphs 1 through 8 of that part of the first amended complaint under the heading identified as "Parties," page 1, line 30 through page 3, line 11, this defendant admits that the named plaintiffs were employees of this defendant at the times therein alleged; admits the allegations of paragraphs 6 and 7; and as to the remainder

of said allegations, states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

III.

Answering the allegations of that part of the first amended complaint under the heading identified as "Class Action," page 3, lines 12 through 26, this defendant admits that plaintiffs bring this action on their own behalf; denies that any person has been denied or will in the future be denied equal employment opportunities from any discriminatory practices; and denies each and every remaining allegation thereof.

IV.

Answering the allegations of Count I of the first amended complaint, page 3, line 27, through page 6, line 15, this defendant admits that plaintiffs therein named were and are employed by this defendant; admits that the Commission issued notices as therein alleged; states that it is without knowledge or information as to the allegations concerning plaintiffs' membership in Teamsters Local No. 70 and plaintiffs' filing of charges with FEPC and the Commission sufficient to form a belief as to the truth thereof; denied that it has engaged in any unlawful employment practice as to plaintiffs or any other of its employees; and except as herein admitted or averred, denies each and every allegation of Count I.

V.

Answering the allegations of Count II of the first amended complaint, page 6, line 16 through page 8, line 29, this defendant incorporates herein its answers as above

stated in paragraphs I, II and III; avers that plaintiff NOLAN MADDEN was employed as a Helper by OAKLAND SCAVENGER COMPANY for the period commencing on September 16, 1959 and ending on April 5, 1972; that on or about April 5, 1972 OAKLAND SCAVENGER COMPANY terminated the employment of NOLAN MADDEN for cause; states that it is without knowledge or information as to the allegations concerning plaintiffs' filing a formal complaint with Local Union #70 sufficient to form a belief as to the truth thereof; denies that it has engaged in any unlawful employment practice as to plaintiff NOLAN MADDEN or any other of its employees; and except as herein admitted or averred denies each and every allegation of Count II.

VI.

Answering the allegations of that part of the first amended complaint under the heading identified as "General Patterns of Discrimination," page 8, line 30 through page 10, line 18, this defendant incorporates herein its answers in paragraphs I, II, III, IV and V; admits that it has no black or Spanish surname officials or managers; denies that it has engaged in any unlawful employment practice as to plaintiffs or any other of its employees; and except as herein admitted or averred denies each and every allegation of that part of the first amended complaint under the heading identified as "General Patterns of Discrimination."

VII.

Answering the allegations of Count III of the first amended complaint, page 10, line 19, through page 11,

line 4, this defendant incorporates herein its answers as above stated in paragraphs I, II, III, IV, V and VI; except as therein admitted or averred, denies each and every allegation of Count III.

VIII.

Answering the allegations of Count IV of the first amended complaint, page 11, lines 5 through 21, this defendant incorporates herein its answers as above stated in paragraphs I, II, III, IV, V and VI; except as therein admitted or averred, denies each and every allegation of Count IV.

IX.

Answering the allegations of that part of the first amended complaint under the heading "Basis For Equitable Relief," page 11, lines 22 through 30, this defendant denies each and every allegation thereof.

X.

As and for a further and separate affirmative defense this defendant alleges that it has committed no unlawful employment practice under the provisions of Title 42, Section 2000e, U.S.C.

XI.

As and for a further and separate affirmative defense this defendant alleges that at no time has it committed any act or engaged in any conduct which violated the provisions of the Civil Rights Act of 1866 (42 U.S.C. Section 1981) or which deprived plaintiffs or any member of any class on whose behalf this action is brought of any right thereunder.

XII.

As and for a further and separate affirmative defense this defendant avers that all or a substantial portion of the conduct, acts or conditions of alleged employment discrimination as set forth by plaintiffs in their first amended complaint, together with all relief and remedies sought in connection therewith, involve matters which are barred by the applicable limitation of actions and provisions of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e et seq.) and by the limitation of actions applicable to causes of action asserted ~~and~~ relief sought under the Civil Rights Act of 1866 (42 U.S.C. Sec. 1981).

XIII.

As and for a further and separate affirmative defense this defendant avers that at all times pertinent hereto it fully performed and discharged in good faith each and every obligation and duty it owed to plaintiffs under applicable state and federal law and under the provisions of collective bargaining agreements negotiated for plaintiffs by their duly authorized agent and representative, defendant Teamsters Union Local No. 70.

XIV.

As and for a further and separate affirmative defense this defendant states that the averments of plaintiffs' first amended complaint do not constitute a proper class action under Rule 23 of the Federal Rules of Civil Procedure. This defendant further avers that the class which plaintiffs purport to represent is not so numerous that joinder of all members is impracticable; the claims of plaintiffs are not typical of the claims of the members of

said class; it alleges that plaintiffs will not fairly and adequately protect the interests of said class; it further avers that it has not acted or refused to act on any ground generally applicable to the members of said class. Furthermore, this defendant avers that in the event plaintiffs may contend that their allegations meet the requisites of subparagraph (b)(3) of Rule 23, plaintiffs have not raised questions of law or fact common to the members of the alleged class which predominate over the questions affecting only individual members of the alleged class, and it further avers that there are other methods of fairly and efficiently adjudicating the controversy, which methods are equal or superior to the proposed class action.

XV.

As and for a further and separate affirmative defense this defendant avers that plaintiffs and the members of the class they seek to represent are estopped to assert that they or any of them have been discriminatorily barred from purchasing stock in OAKLAND SCAVENGER COMPANY for the reason that none of them has ever been ready, willing or able to purchase any of such shares nor has any plaintiff or member of such class offered to purchase any stock in OAKLAND SCAVENGER COMPANY.

XVI.

As and for a further and separate affirmative defense this defendant avers that plaintiffs and the members of the class they seek to represent are estopped to assert that they or any of them have been discriminatorily denied promotion by OAKLAND SCAVENGER COMPANY for the reason that none of them was qualified to be promoted,

and, in the event any of them was qualified he declined to seek or accept a promotion which was available to him.

XVII.

As and for a further and separate affirmative defense this defendant avers that plaintiffs and the members of the class they seek to represent have waived whatever right they may have had to assert they they or any of them have been discriminatorily barred from purchasing stock in OAKLAND SCAVENGER COMPANY for the reason that none of them has ever been ready, willing or able to purchase any of such shares nor has any plaintiff or member of such class offered to purchase any stock in OAKLAND SCAVENGER COMPANY.

XVIII.

As and for a further and separate affirmative defense this defendant avers that plaintiffs and the members of the class they seek to represent have waived whatever right they may have had to assert that they or any of them have been discriminatorily denied promotion by OAKLAND SCAVENGER COMPANY for the reason that none of them was qualified to be promoted, and in the event any of them was qualified he knowingly and intentionally declined to seek or accept a promotion which was available to him.

XIV.

As and for a further and separate affirmative defense this defendant avers that plaintiffs have failed to exhaust all remedies and procedures which are available to him.

WHEREFORE defendant OAKLAND SCAVENGER COMPANY prays that plaintiffs take nothing by their first amended complaint, that this defendant be dismissed from this action and that it be awarded its cost of suit, and for such other and further relief as may be proper.

Dated July 25, 1975.

MOORE, SIZOO & CANTWELL
EDWARD H. MOORE

By: /s/ Edward H. Moore
Attorneys for defendant OAKLAND
SCAVENGER COMPANY

(Certificate of service omitted in printing)

(Case title omitted
in printing)

No. C-75-0060 WAI
COMPLAINT IN
INTERVENTION
(Class Action)
(Filed January
20, 1981)

I

Intervenors, and each of them, adopts and incorporates by reference all the allegations of the First Amended Complaint in the original or main action captioned above, including the allegations appearing therein under the headings "JURISDICTION," "PARTIES," "CLASS ACTION," "COUNT I," "COUNT II," "GENERAL PATTERNS OF DISCRIMINATION," "COUNT III," "COUNT IV," and "BASIS FOR EQUITABLE RELIEF."

Since the filing of the said First Amended Complaint to the present day, all aspects of the wrongful, unlawful, discriminatory, unfair, willful, intentional, and malicious conduct of defendants, and each of them, as there alleged and as adopted and incorporated by reference above have been continued and repeated systematically and on a class-wide basis with all the said preferential treatment of the favored employees and with all the said pervasively adverse and injurious consequences to the black and Spanish sur-named persons constituting the minority employees. To the extent that defendants, or either of them, may have occasionally given the appearance of attempting to improve the situation, such gestures and posturings have themselves been nothing but knowing, willful, intentional, false, fraudulent and malicious ruses and devices by which to lull and mislead while perpetuating, rather than essentially departing from the system of employment discrimination and unfair union representation based on race and national origin.

All of intervenors are, and have for a substantial period been, employed as scavengers by defendant OAKLAND SCAVENGER COMPANY and dues-paying members of defendant INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL NO. 70, and each of intervenors is among the minority employees wrongfully, unlawfully, willfully, intentionally, and maliciously victimized and injured as aforesaid. Intervenor CURTIS STREDIC is a black person, and intervenors

JOAQUIN MORELES BONILLA, ARMAND CARDENAS, ENRIQUE CARDENAS, HELIODORO CARDENAS, BENJAMIN CEJA, JOSE GUZMAN, JOSE LOPEZ, LUIS MAGALLON, OCTAVIO MARQUEZ, RAUL MENDEZ, GILBERTO PALAFOX, JOEL PINEDO, FELIX R. SANCHEZ, JESUS SANCHEZ, and JOSE TORES are all Spanish sur-named persons.

IV

The parties originally filing the First Amended Complaint in the main action are no longer prosecuting the same on behalf of other members of the class of black and Spanish sur-named persons similarly situated with respect to the misconduct of defendants, and intervenors, and each of them, are qualified and wish to, and hereby do, file this Complaint In Intervention not only on their own behalf as individuals, but also on behalf of members of the said class of persons similarly situated.

V

Intervenors and the class they represent are, in addition to the equitable relief prayed for in the said First Amended Complaint, entitled to receive compensatory damages for the following items, the full extent of which intervenors do not now know with certainty but which they pray may be inserted herein when ascertained or on proof thereof:

(a) Each of intervenors is entitled to damages on account of the injuries and losses referred to in the First Amended Complaint, including back pay and damages for the loss of profits and gains due to exclusion from shareholding status.

(b) During the period of his employment, each of intervenors has been, and will continue to be, caused to undergo a course of extreme mental suffering, indignity, humiliation, emotional anguish and distress, and shock to his nervous system, all to his serious general damage.

(c) Each of intervenors has been, and will continue to be, compelled to incur costs and expenses in instituting and pursuing this litigation, including court costs and attorney's fees.

(d) By reason of having to become personally active in and pursuing this litigation, each of intervenors has been, and will continue to be, caused to suffer mental and emotional fear, anxiety, and distress and personal inconvenience.

VI

With respect to intervenors, and each of them, as well as the class they represent, all aspects of the aforementioned misconduct of defendants, and each of them, have been knowing, willful, intentional, and malicious, and, by reason of the premises, each of intervenors is entitled to receive, in addition to the compensatory damages referred to above, exemplary damages in a substantial sum from each of defendants.

WHEREFORE, intervenors, and each of them, adopt and incorporate by reference the prayer of the First Amended Complaint in the original or main action and pray further that the judgment (1) grant the equitable relief prayed for, and each part thereof, in a manner including intervenors, and each of them, among those to be benefited; (2) award to intervenors, and each of them,

all aspects of the monetary relief prayed for, including back pay, damages for losses due to exclusion from shareholding status, costs and attorney's fees, and exemplary damages; (3) award to intervenors, and each of them, and to the class they represent damages, according to proof, for mental pain and suffering, humiliation, indignity, emotional anguish and distress, and shock to their nervous system; (4) award to intervenors, and each of them, damages, according to proof, for fear, anxiety, distress, and personal inconvenience arising out of becoming active in and pursuing this litigation; and (5) grant to intervenors, and each of them, and to the class they represent such other and further relief as the Court deems proper.

GUNHEIM & YTURBIDE

By: B. V. YTURBIDE

Attorneys for Intervenors

(Certificate of service omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	No. 75-0060-CAL
)	ANSWER TO
)	DEFENDANT
)	OAKLAND
(Case title omitted)	SCAVENGER
in printing))	COMPANY TO
)	COMPLAINT IN
)	INTERVENTION
)	
)	
)	

As answer to the complaint in intervention, defendant Oakland Scavenger Company adopts and incorporates by reference the "Answer of Defendant Oakland Scavenger to First Amended Civil Rights Complaint" and denies each and every allegation of the complaint in intervention, except as hereafter expressly admitted or averred:

1. Admits that plaintiffs named in Paragraph III were employed by this defendant; avers that all plaintiffs in intervention, except Octavio Marquez, Jose Guzman, and Felix Sanchez, are still employed by this defendant; states that it is without knowledge or information as to the allegations concerning the plaintiffs in intervention's membership in Teamsters Local 70 and therefore denies them; and denies that it has engaged in any unlawful employment practice as to plaintiffs in intervention or any other of its employees.

2. Admits that the plaintiffs who originally filed the first amended complaint are no longer prosecuting this action.

FIRST AFFIRMATIVE DEFENSE

(Failure to Exhaust Remedies)

For its first separate and affirmative defense, defendant Oakland Scavenger Company alleges that the Court is without jurisdiction under 42 U.S.C. 2000-5(e) because some or all plaintiffs in intervention have failed to exhaust their administrative remedies before the Equal Employment Opportunity Commission; they have not filed timely charges with the Equal Employment Opportunity Commission or the California Fair Employment and Housing Commission; and some or all of them have not been issued "Right to Sue Letters" by the Equal Employment Opportunity Commission prior to the commencement of the action.

SECOND AFFIRMATIVE DEFENSE

(Failure to State a Claim)

For its second separate and affirmative defense, defendant Oakland Scavenger Company alleges that the Complaint in Intervention fails to state a claim for which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

(Bona Fide Seniority System)

For a third separate and affirmative defense, defendant Oakland Scavenger Company alleges that some or all of differences in compensation or other terms, conditions or privileges of employment of which plaintiffs in intervention complain occurred pursuant to a bona fide seniority system; were not the result of an intention to discriminate because of race, color, religion, sex or nation of ori-

gin, and were the result of a protected employment practice under 42 U.S.C. Section 2000e-2(h).

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

For a fourth separate and affirmative defense, defendant Oakland Scavenger Company alleges that some or all of plaintiffs in intervention had an opportunity to bid on various higher paying driving positions; that some or all of plaintiffs in intervention had sufficient seniority to obtain a higher paying driving position; and that some or all of plaintiffs in intervention failed to mitigate damages by not bidding on various higher paying driving positions.

FIFTH AFFIRMATIVE DEFENSE

(Limitations of Actions)

For a fifth separate and affirmative defense, defendant Oakland Scavenger Company alleges that the complaint is barred by the one-year limitation under California Code of Civil Procedure § 340(3); the three-year limitation under California Code of Civil Procedure § 338(1); the 90 day limitation after issuance of a "Right to Sue Letter", and the 180 day and 300 day limitations for filing a charge with the Fair Employment and Housing Commission and Equal Employment Opportunity Commission, respectively, under 42 U.S.C. Section 2000e-5e.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

Defendant Oakland Scavenger Company alleges that the action is barred by the equitable doctrine of laches.

WHEREFORE defendant Oakland Scavenger Company prays that plaintiffs take nothing by their complaint in intervention, that this defendant be dismissed from this action, and that it be awarded its costs of suit and attorney fees, and for such other and further relief as may be granted.

Dated: April 29, 1985.

/s/ Stephen McKae

(Certificate of service omitted in printing)

(Received July 2, 1985)

KENNETH N. SILBERT, ESQ.,
 BEESON, TAYER & SILBERT
 100 Bush Street, Ste. 1500
 San Francisco, Calif. 94104
 415/986-4060
 Attorneys for Defendant
 Local 70

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

PERFECTO MARTINEZ, et al.,)	
)	
Plaintiffs,)	C-75-0060-CAL
)	
v.)	ANSWER OF
)	DEFENDANT
OAKLAND SCAVENGER)	LOCAL 70 TO
)	COMPLAINT IN
COMPANY, et al.,)	INTERVENTION
)	
Defendants.)	
)	

Defendant BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS, Local 70 (Local 70) hereby answers the Complaint in Intervention as follows:

I.

Answering the allegations of Paragraph I, Defendant hereby incorporates by reference its Answer to the First Amended Complaint.

II.

Defendant denies the allegations of Paragraph II, all and singular.

III.

Answering the allegations of Paragraph III, Defendant admits that intervenor Curtis Stredic is a Black person; that all other intervenors are Spanish surnamed persons; that all intervenors are or were employees of Defendant Oakland Scavenger Company; and that all intervenors are or were dues paying members of Defendant Local 70. Except as so expressly admitted herein, the allegations of Paragraph III are denied, all and singular.

IV.

Answering the allegations of Paragraph IV, Defendant admits that the parties filing the First Amended Complaint in the main action are no longer prosecuting the action on behalf of themselves or any other persons. Except as so expressly admitted herein, the allegations of Paragraph IV are denied, all and singular.

V.

Defendant denies the allegations of Paragraphs V and VI, all and singular.

AFFIRMATIVE DEFENSES

I.

Defendant Local 70 hereby incorporates by reference its Affirmative Defenses to the First Amended Complaint.

II.

As and for its Sixth Separate and Affirmative Defense, Defendant alleges that the Court lacks jurisdiction

with respect to Intervenor's claims under Title VII of the Civil Rights Act of 1964, 42 USC § 2000 (e) *et seq.*, on the grounds that Intervenor has failed to file charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and the California Fair Employment Practices Commission (FEPC), and have otherwise failed to exhaust their administrative remedies.

III.

As and for its Seventh Separate and Affirmative Defense, Defendant alleges that the Court lacks jurisdiction of the Spanish-surnamed Intervenor under the Civil Rights Act of 1866, 42 U.S.C. 1981, on the ground that said Act does not prohibit discrimination on the basis of national origin.

IV.

As and for its Eighth Separate and Affirmative Defense, Defendant alleges that the Court lacks jurisdiction over Intervenor's claims for punitive damages for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, and for breach of Defendant's duty of fair representation, on the ground that such damages are not permitted by law.

V.

As and for its Ninth Separate and Affirmative Defense, Defendant alleges that Intervenor's claims are barred by the applicable statutes of limitations.

VI.

As and for its Tenth Separate and Affirmative Defense, Defendant alleges that the Court lacks jurisdiction

over certain employment practices complained of by Intervenor on the ground that said practices were the result of the application of a *bona fide* seniority system and a protected employment practice within the meaning of 42 U.S.C. 2000e - 2(h).

VII.

As and for its Eleventh Separate and Affirmative Defense, Defendant alleges that the Complaint in Intervention is barred by the equitable doctrine of laches.

VIII.

As and for its Twelfth Separate and Affirmative Defense, Defendant alleges that the Complaint in Intervention fails to state a claim upon which relief can be granted.

WHEREFORE, Defendant prays that Intervenor take nothing by their Complaint in Intervention; that Defendant be dismissed from this action; that Defendant be awarded its costs of suit and attorney's fees; and for such other relief as the Court may deem just and proper.

Dated: July 1, 1985. Beeson, Tayer & Silbert

By: /s/ Kenneth N. Silbert
Kenneth N. Silbert
Attorneys for Defendant
Local 70

(Certificate of service omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060-CAL

DEFENDANT OAKLAND SCAVENGER COMPANY'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT [FRCP 56]

(Filed July 29, 1985)

(case title omitted in printing)

Please take notice that on August 23, 1985, at 9:30 a.m. or as soon thereafter as counsel may be heard, before The Honorable Charles A. Legge, at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, defendant Oakland Scavenger Company will and hereby moves the court for an order, pursuant to Rule 56, Federal Rules of Civil Procedure, granting partial summary judgment for defendant Oakland Scavenger Company. This motion is made on the grounds that Jose Torres, one of the intervening plaintiffs, failed to file a notice of appeal from the district court's order of August 31, 1981, dismissing his claim and the order of dismissal, as to him, has become final.

This motion is based on this notice, the memorandum of points and authorities in support of defendant's motion for partial summary judgment, the declaration of Stephen McKae in support of defendant's motion for partial sum-

mary judgment, and the pleadings, records and other papers on file in this action.

Dated: July 26, 1985.

MOORE, SIZOO, CANTWELL
& McKAE

/s/ Carol A. Malenka
Carol A. Malenka
Attorneys for Defendant
Oakland Scavenger Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060-CAL

DEFENDANT OAKLAND SCAVENGER COMPANY'S
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT

(Filed July 29, 1985)

(case title omitted in printing)

Defendant Oakland Scavenger Company submits this memorandum of points and authorities in support of its motion for partial summary judgment with respect to the claims of Jose Torres, one of the plaintiffs in intervention, who failed to appeal from the district court's order of August 31, 1981, dismissing his claim.

STATEMENT OF FACTS

Jose Torres was one of the sixteen individuals who sought and was granted leave to intervene as a plaintiff in 1981. The district court subsequently granted defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and entered judgment of dismissal on August 31, 1981.

A notice of appeal was filed on September 29, 1981. (A true copy of the notice of appeal is attached as Exhibit "A" to the supporting declaration of Stephen McKae. The caption is titled "Joaquin Morales Bonilla, et al., Plaintiffs in Intervention, v. Oakland Scavenger Company, et al., Defendants." In the body of the appeal, the individual plaintiffs taking the appeal were specified.

Plaintiffs omitted Jose Torres from both the caption and the body of the appeal. Also plaintiffs-appellants did not list Jose Torres in the required certification as to interested parties in their brief to the Ninth Circuit. (A true copy of appellants' brief, pages 1 and 2, are attached as Exhibit "B" to the supporting declaration of Stephen McKae).

Defendant-appellee Oakland Scavenger Company noted the omission of Jose Torres from plaintiffs-appellants' notice of appeal and certification as to interested parties. Defendant-appellee brought this omission to plaintiffs-appellants' attention and to the court's attention in footnote 3 of their brief. (A true copy of brief of appellees, page 5, fn. 3, attached as Exhibit "C" to the supporting declaration of Stephen McKae.) Plaintiffs-appellants did not make a motion under Rule 4(a)(5) of Federal Rule of Appellate Procedure to permit late filing of the notice of appeal on behalf of Jose Torres, despite this notice.

Following the Ninth Circuit's decision, Oakland Scavenger Company petitioned the United States Supreme Court for a Writ of Certiorari. In their petition, Oakland Scavenger Company noted that Jose Torres had not appealed from the District Court decision. (A true copy of the petition for writ of certiorari, page 8, is attached as Exhibit "D" to the supporting declaration of Stephen McKae.) Respondents did not address the omission in their papers.

This action is now before the District Court after denial of the petition for writ of certiorari.

ARGUMENT

Summary judgment is appropriate if the papers on file and affidavits show that "... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(c). Summary judgment may be granted as to any part of a claim. Federal Rule of Civil Procedure 56(a).

Timely filing of a notice of appeal is a jurisdictional prerequisite to an appeal. The content of the notice of appeal is governed by Federal Rule of Civil Procedure 3(c), which states "[t]he notice of appeal shall specify the party or parties taking the appeal..." The purpose of a notice of appeal is to inform the other parties of the intention to appeal and to determine which parties are pursuing an appeal.

Where more than one party is appealing, the names of each party pursuing an appeal should be specified. Use of the term "et al." is not sufficient. *Van Jose v. Edson* (6th Cir. 1971) 450 F.2d 746. Attorneys in multi-party litigation should name the individual plaintiffs who are appealing. *Samuel v. University of Pittsburgh* (13th Cir. 1974) 506 F.2d 355, n.1. After the time for filing an appeal has expired, the notice of appeal filed by one party cannot be amended to include additional parties. *Cook and Sons Equipment, Inc. v. Killen* (9th Cir. 1960) 277 F.2d 607, 609.

The facts pertaining to this motion are not in dispute. The notice of appeal did not list Jose Torres as one of the appealing parties. Counsel for plaintiffs in intervention has characterized the omission of Jose Torres from the

notice of appeal as a clerical error. (Status Conference Statement of plaintiffs in intervention, dated March 14, 1985.) Counsel for plaintiffs in intervention was informed of the error but did not make a motion for an extension of time to file an appeal or to amend the notice of appeal. They have made no subsequent efforts to obtain other relief.

Failure to name a party as taking an appeal is not "harmless error". *Cook and Sons, supra*. The appellate court has jurisdiction over only those parties who file appeals. In this case, Jose Torres did not appeal, and the district court no longer has jurisdiction to allow amendment of the notice of appeal. Oakland Scavenger Company did not consider Jose Torres to be one of the appealing parties and plaintiffs-appellants made no effort to correct the omission, therefore, Jose Torres should not be permitted to become a party to the appeal at this late date.

CONCLUSION

Defendant Oakland Scavenger Company respectfully asks the court to dismiss plaintiff in intervention, Jose Torres, from this action on the grounds that he did not appeal the district court's dismissal of this action.

Dated: July 26, 1985

MOORE, SIZOO, CANTWELL
& McKAE

/s/ Carol A. Malenka
Attorneys for Defendant
Oakland Scavenger Company

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060-CAL

DECLARATION OF STEPHEN McKAE IN SUPPORT OF DEFENDANT OAKLAND SCAVENGER COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed July 29, 1985)

(Case title omitted in printing)

I, Stephen McKae, declare:

1. I am the attorney of record for defendant Oakland Scavenger Company in the above-entitled action. My business address is Suite 1040, Wells Fargo Building, 1333 Broadway, Oakland, California, 94612.

2. Attached as Exhibit "A" is a true copy of the notice of appeal filed in this action on September 29, 1981.

3. Attached as Exhibit "B" is a true copy of pages 1 and 2 of the brief of plaintiffs-appellants to the Ninth Circuit.

4. Attached as Exhibit "C" is a true copy of page 5 of the brief of defendant-appellee to the Ninth Circuit.

5. Attached as Exhibit "D" is a true copy of page 8 of the petition of defendant Oakland Scavenger Company for writ of certiorari.

(Jurat omitted)

Dated: July 26, 1985

MOORE, SIZOO, CANTWELL
& McKAE

/s/ Stephen McKae
Stephen McKae
Attorneys for Defendant
Oakland Scavenger Company

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA**

File No.: _____

**CIVIL ACTION NO. C-75-0060 WAI
NOTICE OF APPEAL**

(Filed September 2, 1981)

(Case title omitted in printing)

NOTICE IS HEREBY GIVEN that plaintiffs in intervention, JOAQUIN MORELES BONILLA, ARMAND CARDENAS, ENRIQUE CARDENAS, HELIODORO CARDENAS, BENJAMIN CEJA, JOSE GUZMAN, JOSE LOPEZ, LUIS MAGALLON, OCTAVIO MARQUEZ, RAUL MENDES, GILBERTO PALAFOX, JOEL PINEDO, FELIX R. SANCHEZ, JESUS SANCHEZ, and CURTIS STREDIC, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in this action on the 21st day of August, 1981.

Dated: September 29, 1981.

**B. V. YTURBIDE
GUNHEIM & YTURBIDE**

By: /s/ B. V. Yturbide
B. V. YTURBIDE
Attorneys for Intervenors

EXHIBIT B

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 81-4522

D.C. No. C 75-0060 W.A.I.

(Case title omitted in printing)

On Appeal from the United States District Court
For the Northern District of California

Honorable William A. Ingram, Judge

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned, counsel of record for plaintiffs and intervention appellants, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal.

Joaquin Moreles Bonilla, Plaintiff In Intervention
Armando Cardenas, Plaintiff In Intervention
Enrique Cardenas, Plaintiff In Intervention
Heliodoro Cardenas, Plaintiff In Intervention
Benjamin Ceja, Plaintiff In Intervention
Jose Guzman, Plaintiff In Intervention
Jose Lopez, Plaintiff In Intervention
Luis Magallon, Plaintiff In Intervention
Octavio Marquez, Plaintiff In Intervention
Raul Mendez, Plaintiff In Intervention
Gilberto Palafox, Plaintiff In Intervention
Joel Pinedo, Plaintiff In Intervention
Felix R. Sanchez, Plaintiff In Intervention

Jesus Sanchez, Plaintiff In Intervention
 Curtis Stredic, Plaintiff In Intervention
 B. V. Yturbide, Esq.
 Gunheim & Yturbide,
 Attorneys for Plaintiffs In Intervention
 Oakland Scavenger Company, Defendant
 Stephen McKae, Esq.
 Moore, Sizzo & Cantwell,
 Attorneys for Defendant Oakland Scavenger Company
 International Brotherhood Of Teamsters,
 Chauffeurs, Warehousemen And Helpers of
 America, Local 70, Defendant
 Burton F. Boltuch, Esq.
 Beeson, Tayer, Kovach & Silbert,
 Attorneys for Defendant International
 Brotherhood of Teamsters, Chauffeurs,
 Warehousemen And Helpers of America,
 Local 70

/s/ B. V. Yturbide
 B. V. YTURBIDE
 Attorney for Plaintiffs and
 Intervention Appellants.

EXHIBIT C

The complaint in intervention filed January 20, 1981, (CR 81) contained no specific allegations of discrimination with respect to the sixteen³ intervenors, but incorporated the allegations of the first amended complaint, none of which specifically pertained to them. It further charged that after the original action was filed, the defendants engaged in conduct continuing prior discrimination and used

³ Notice of Appeal has not been filed on behalf of the sixteenth person, Jose Torres, whose name, apparently by oversight, never appeared in the caption. He is not listed by appellants as a person interested in the outcome.

"fraudulent and malicious ruses and devices by which to lull and mislead" the class by giving "the appearance of attempting to improve the situation."

In response to appellants' attempt to intervene, Oakland Scavenger Company and Local 70 filed, among other things, motions to dismiss and for summary judgment. (CR 59, 61, 62, 63, 65, 70, 71, 72, 75, 76, 77, 84 and 85). Hearing on these motions was put over until after the complaint in intervention was filed on January 20, 1981. Among the grounds asserted by Oakland Scavenger Company were that neither Section 1981 nor Title VII applied to the private, unadvertised sale of corporate stock, and that stockholders enjoyed a proprietary right, protected under the Fifth Amendment, to preference in job selection and compensation. (CR 61; CR 62) The company also claimed that Section 1981 applied only to discrimination on the basis of race and did not apply to this case, where all stockholders were persons of Italian ancestry and all share purchases were made either by members of the shareholders' families or by the company itself, making national origin or

EXHIBIT D

tionship that is offered generally or widely were not intended to be within the scope of the Act. *Runyon v. McCrary*, 427 U.S. 160, 190 (1976).

Having established that on the facts presently before the Court Section 1981 does not prohibit the private unadvertised sale of Oakland Scavenger Company stock, it is apparent that plaintiffs have failed to state a claim under Title VII as well Plaintiffs have cited no authority, and apparently none exists, which

would demonstrate that the shareholders of the Oakland Scavenger Company may not exercise their proprietary preference and reserve for themselves and their families the most attractive and highest paying positions. The right to hold specific private employment and to follow a specific private profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment of the United States Constitution. *Green [Greene] v. McElroy*, 360 U.S. 474, 492 (1959). Similarly, an individual cannot be precluded from pursuing any lawful occupation in a manner inconsistent with due process or the equal protection of the laws. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957). From this it follows that the stockholders of the Oakland Scavenger Company have the right to employ themselves and their families at whatever position and salary they can afford.

Judgment of dismissal was entered under Rule 12(b)(6) on the ground that the intervenors had failed to state a claim upon which relief could be granted.

Fifteen of the sixteen intervenors appealed. Notice of appeal was not filed on behalf of intervenor Jose Torres and he was not listed by respondents in their opening brief to the Ninth Circuit as a party interested in the outcome. The Ninth Circuit reversed and remanded.

The opinion was divided into two parts. The first part concerned respondents' allegations of discrimination in general. The Ninth Circuit acknowledged that petitioner

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

NOTICE OF ADOPTION OF MOTION

(Filed August 15, 1985)

(Case title omitted in printing)

To: Counsel of Record for all parties:

PLEASE TAKE NOTICE that Defendant Teamsters Local 70 hereby adopts the Notice of Motions and Motions for Partial Summary Judgment heretofore filed by Defendant Oakland Scavenger Company to the extent that summary judgment is requested against Plaintiff Jose Torres, and further to the extent that judgment is requested against all Plaintiffs on their claims arising under 42 U.S.C. § 1981.

In support thereof Defendant Teamsters Local 70 relies upon the Declarations and Memoranda heretofore filed by Defendant Oakland Scavenger in support of said Motions.

Dated: August 5, 1985

BEESON, TAYER, & SILBERT

By: /s/ Duane B. Beeson
Duane B. Beeson
Attorneys for Defendant 70

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

AMENDED NOTICE OF ADOPTION

(Filed August 14, 1985)

(Case title omitted in printing)

To: Counsel of Record for all Parties:

PLEASE TAKE NOTICE that Defendant Teamsters Local 70, having previously adopted the Notice of Motions and Motions for Partial Summary Judgment heretofore filed by Defendant Oakland Scavenger Company, to the extent that summary judgment is requested against Plaintiff Jose Torres, and further to the extent that judgment is requested against all Plaintiffs on their claims arising under 42 U.S.C. 1981, hereby amends its Notice of Adoption to reflect the correct hearing date for these Motions of September 6, 1985.

In support of its Adoption of Defendant Oakland Scavenger's Motions, Defendant Teamsters Local 70 relies on the Declarations and Memoranda heretofore filed by Defendant Oakland Scavenger in support of said Motions.

DATED: August 12, 1985

BEESON, TAYER & SILBERT

By: /s/ Marie M. Rongone

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

(Case name omitted in printing)

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST JOSE TORRES

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST JOSE TORRES

(Case Name Omitted in Printing)

Plaintiffs in Intervention (hereinafter "plaintiffs") respectfully submit the following points and authorities in opposition to the motion filed by defendant Oakland Scavenger Company for partial summary judgment dismissing the action as to plaintiff Joe Torres:

STATEMENT OF FACTS

The relevant facts are set forth in the opposing declaration (hereinafter cited as "Decl.") of B. V. Yturbide, who has represented plaintiffs throughout their direct in-

volvement in this suit, including the proceedings resulting in Judge Ingram's dismissal in 1981 of their intervention action and the ensuing appeal taken to the Ninth Circuit.

A. The Representative Nature of the Action

From the inception, it was the intention of plaintiffs, duly reflected in their complaint in intervention, to join together with respect to the basic discrimination issues involved and to do so not only in the promotion of their respective individual interests, but also on behalf of absent members of a potential class. In its styling, their complaint added the phrase, "individually and on behalf of all others similarly situated." By the allegations in the body of the complaint, the potential involvement of a class action and the desire of plaintiffs to pursue one were made clear. (Decl., par. 3.)

B. The General and Commonly Adverse Dismissal

The reasoning of Judge Ingram¹ resulting in the dismissal and the ensuing appeal did not separate plaintiff Jose Torres from the others in any way or involve any individual variations among the plaintiffs but was addressed to basic, overall considerations which would affect alike plaintiffs as a group and, for that matter, absent members of the same class as well. (Decl., par. 4.)

C. The Omission Contrary to Intent and Through Clerical Inadvertence

Accordingly, each of the plaintiffs alike, including Jose Torres, intended to pursue the appeal from the dismissal ruling as a whole not only for himself, but also for the rest of the group and for absent members of the poten-

tial class, and it was his intention so to reflect in the Notice of Appeal Yturbide caused to be typed and filed. The notice was typed by his secretary at the time, Patricia G. Pedersen, whom he had found to be extraordinarily reliable over a period of many years. Yturbide's detailed dictation to her dealt with the substantive part of the notice which would follow the styling and the designation of the appealing parties, and he gave her explicit instructions as to how the notice should be styled and the naming of the appellants. His instructions were that the styling should include the name of the plaintiff whose surname was first in alphabetical sequence, followed by the phrase "et. al.," and that then, at the beginning of the notice itself, all the plaintiffs were to be specifically designated as appellants by copying their names as appearing in the Complaint in Intervention. Ms. Pedersen intended to follow those instructions but, purely through clerical inadvertence, did not include the name of Jose Torres in the course of copying from the complaint. The likely explanation of the inadvertence is, Yturbide believes, to be found in the fact that the plaintiffs listed in the complaint included fifteen persons with Spanish surnames and three with the first name "Jose." In all events, neither Yturbide nor anyone ever indicated to Ms. Pedersen in any way that Mr. Torres was to be omitted from the specification of appellants. Her own sworn declaration corroborating the foregoing has been obtained. (Decl., par. 5, and Exs. A and B thereto.)

D. A Mere "Oversight" Without Harm on the Appeal

I am unaware of any indication whatsoever that the clerical error (which was perpetuated when the names are

appearing on the Notice of Appeal were incorporated in the Certification of Parties Interested in the Appeal) has ever been harmful to anyone in any way. In particular, there is nothing to indicate that it misled either defendant or the appellate court or otherwise improperly influenced the appeal. To the contrary, defendant, who first became aware of the inadvertent omission of Mr. Torres' name from the Notice of Appeal and Certification of Interested Parties, called attention to it and its innocent cause in the Brief for Appellee. The pertinent footnote in that brief made no pretense of an intention to omit naming Mr. Torres as an appealing and interested party, and expressly recognized that his name had not been included "apparently by oversight." Neither before nor after the omission was thus noted did anything occur, causing the status of Mr. Torres to influence the course of the appeal. The issues argued and resolved on the appeal were not of varying individualized concern but were of general and the same concern to all the plaintiffs and to absent members of the potential class. (Decl., par. 6 and Ex. C thereto.)

E. Defendant's Lack of Concern

At no time during the appeal did defendant, whether by motion to dismiss or otherwise, initiate any proceeding designed to assure that Mr. Torres would not be considered a party interested in the appeal and entitled to the benefit of any favorable outcome which might ensue. Indeed, although the aforementioned footnote in the Brief for Appellee called attention to the omission, nothing was said in that footnote or elsewhere to suggest that defendant opposed the Court's consideration of Mr. Torres as an in-

involved party, let alone that defendant was moving, or intended to move, for a dismissing determination by the Court as to him. As far as the Court was given to understand, defendant was not concerned about the acknowledged "oversight." (Decl., par. 7.)

F. Yturbide's Reasons For Not Raising a Clamor at the Time

On the other hand, it was Yturbide's judgment that no affirmative steps on his part in the appellate court to assure the continuing viability of the appeal as to Mr. Torres was necessary or wise in the circumstances. As he assesses the situation, it embraced the following elements:

(a) The action was such that the Notice of Appeal had representative potential to protect interested persons not specifically named as appellants, including Mr. Torres;

(b) Defendant not only had itself acknowledged that the omission was the result of mere "oversight," but had refrained from assuming a threatening posture in the matter;

(c) The "oversight" would readily be recognized as a purely technical one of no harmful consequence to anyone in view of the generalized issues involved;

(d) Denial to Mr. Torres of any relief forthcoming on the appeal would in all likelihood be regarded as particularly harsh since entirely absent persons of the same class would benefit from that relief; and

(e) Altogether, as things stood, the Court, if ultimately reversing the dismissal, would not be inclined to single out Mr. Torres but would reverse in a fashion beneficial to all interested persons in general, including him, whereas an effort by Yturbide to file a late Notice of

Appeal as to him or the like would be regarded as a self-confession that such notice was essential to his sharing in the relief and/or might otherwise serve to give undue importance to a matter about which nobody, including defendant, appeared to be concerned at the time. (Decl., par. 8.)

G. The Appellate Court's Extension of Relief to Torres and Others Not Specified as Appellants

Yturbide's judgment proved correct. The Court not only reversed the judgment of dismissal as a whole, without qualification as to Mr. Torres or anyone, but also went out of its way to do so in a manner indicating an intention to benefit him and other interested persons not specifically named as appellants. In styling its opinion, after naming the appellants as specified on the Notice of Appeal, the Court added an important phrase not appearing on the notice but in keeping with the Complaint in Intervention. The added phrase is "individually and on behalf of all others similarly situated." (Decl., par. 9 and Exs. D and E thereto.)

H. Defendant's Lack of Prejudice and Attempt to Benefit from Torres' Continued Involvement

Defendant has suffered no prejudice with respect to Mr. Torres. In the certiorari proceeding before the Supreme Court, defendant for the first time argued in passing that the case remain dismissed as to Mr. Torres notwithstanding the Ninth Circuit's decision. It seemed obvious to Yturbide that no fit occasion for debating the point was presented, and, in any event, no harm to defendant could have come from the lack of responsive com-

ment on a matter which was not, and was not claimed to be, germane to whether or not the Supreme Court should intercede. On fit occasion, plaintiffs have certainly not hesitated to make their opposing view known, as, for example, in their statement for the status conference held on March 14, 1985. Since the remand, neither in discovery nor otherwise has defendant been led to handle Mr. Torres other than as one of the ongoing plaintiffs. He was deposed by defendant along with the rest of plaintiffs. (Decl., par. 10 and Ex. F thereto.)

Rather than being prejudiced by the continued involvement of Mr. Torres in the case, defendant is even now endeavoring to benefit from it. In support of its pending Motion for Partial Summary Judgment Concerning § 1981 and NLRB Jurisdiction, defendant relies on part of Mr. Torres' deposition taken on May 7, 1985. (Decl., par. 11 and Ex. G thereto.)

ARGUMENT

I. The Motion Should be Denied for Each of Several Reasons which in Combination Compel Denial

We will demonstrate later that the motion should be denied because it comes too late and in the wrong form and is otherwise procedurally inept and futile. Immediately below, however, we first address the several substantive reasons for denial, each of which should in itself be decisive but which, in combination, can leave no reasonable doubt as to the motion's lack of merit.

A. The Motion is Contrary to the Ninth Circuit's Disposition

To begin with, unlike the appellate court, defendant closes its eyes to the representative potential of proceedings in this suit, including the Notice of Appeal. Right or wrong, even though made aware of the inadvertent omission of Torres' name from the Notice of Appeal or, perhaps, because of that very awareness, the Court chose to extend the relief granted to all the interested persons adversely affected by the dismissal. The reversal was complete and unqualified, totally abolishing Judge Ingram's ruling. Yet more, the Court took affirmative pains to show that its decision applied not just to the specified appellants but also to "all others similarly situated." Simply put, granting the present motion would violate that intention.

B. The Motion is Contrary to the Authorities Truly in Point

Even if the appellate court had not acted here as it did, denial of the motion would be counseled by the cases truly in point. They hold that Rule 3(e) cited by defendant is not to be rigidly applied in appropriate circumstances to withhold protection of an appeal from a party merely because his name was omitted from the Notice of Appeal. Those holdings have been based on one or more of the circumstances which are all present here, namely, (a) the "clerical" inadvertence leading to the omission, (b) the commonality of the appellate issues to all the interested parties, including the unnamed one, and (c) the lack of the opponent's adverse reliance on the omission or any

other harm or prejudice to the appeal or the opponent. (e.g., *Harrison v. U.S.*, (8th Cir., 1983) 715 F.2d 1311, 1312; *Williams v. Frey*, (3rd Cir., 1977) 551 F.2d 932, 934; *Parrish v. Board of Com'rs.*, (5th Cir., 1974) 505 F.2d 12, 16, [withdrawn on other grounds (1975) 509 F.2d 540]; *Brubaker v. Board of Education*, (7th Cir., 1974) 502 F.2d 973, 983.)

Scholars in the field of federal law have joined in recognizing that the doctrine of harmless error embodied in Rule 61 of the Federal Rules of Civil Procedure extends to appellate proceedings and that enjoinder of appellate relief ought not to be withheld from an interested party in the Notice of Appeal if the omission of his name was inadvertent and has resulted in no harm. (See, e.g., 9 Moore and Lucas, *Moore's Federal Practice* (2d ed. 1970) § 203.17, p. 3-70.

C. A Ruling Against Torres Would Be Especially Harsh and Unfair

The case for leniency as to Torres is a particularly strong one for another reason. To be sure, all the circumstances emphasized in the cases just cited cry out against denying him a trial on the merits of his claim of employment discrimination. Additionally, however, it would be unconscionably harsh and unfair to single him out in that drastic manner when, from the start, all the plaintiffs, including those specified in the Notice of Appeal, have wished to represent members of the same class and where those entirely absent persons would be left in a better position than Mr. Torres with respect to the appellate court's reversal of Judge Ingram's erroneous dismissal. Such a ruling against him would be a "manifest injustice," which,

after all, is something to be a zealously avoided in this kind of context as in others. (See *Harrison v. U.S.*, (8th Cir., 1983) 715 F.2d 1311, 1313.) It should be stressed, indeed, that Courts have been especially reluctant to dispose of civil rights claims by dismissal or in other summary fashion. (e.g., *Thomas v. Younglove*, (9th Cir., 1976), 545 F.2d 1171, 1172; see, 10A Wright and Miller, *Federal Practice and Procedure*, (2d ed. 1983) § 2732.2, pp. 340-62.)

D. The Cases Cited by Defendant are Readily Distinguishable and Tend to Hinder Rather Than Support the Motion

In their holdings, the cases cited by defendant are readily distinguishable and useless here. In language, although emphasizing the usual requirement for specification of the appellants in the Notice of Appeal, all three cases contain at least some language recognizing that withholding appellate remedy from an unspecified party ought not to occur in special circumstances like the present ones. Thus on balance, to the extent that they are meaningful here at all, they are of a tendency militating against the present motion, rather than supporting it.

In one of the cases, the appeal was dismissed but not of the lack of specification of appellants but because the order involved was not appealable. It was noted in passing that the omission of some interested parties from the Notice of Appeal had apparently been intentional but was "harmless" in the circumstances. (*Samuel v. University of Pittsburgh*, (13th Cir., 1974) 506 F.2d 355, 357, fn. 3.)

In *Cook and Sons Equipment, Inc., v. Killen* (9th Cir., 1960) 277 F.2d 607, 609, the Court refused to include as ap-

pellants individual defendants where only the corporation had been specified in the Notice of Appeal. The Court stressed that, on the facts involved, the omission involved much more than "a clerical error."

In *Van Hoose et al. v. Eidsen* (6th Cir., 1971) 450 F.2d 746, 747, the Court held that the phrase "et al." on a Notice of Appeal after the naming of one appellant was not sufficiently specific to designate coparties as appellants and dismissed the appeal as to all of the appellants named. Other courts have reached a different result in such a situation. (e.g., *Parrish v. Board of Com'rs.*, (5th Cir., 1974) 505 F.2d 12, 16 [withdrawn on other grounds (1975) 509 F.2d 540].) Whatever the merit in the holding of *Van Hoose*, the Court pointed out that "This is more than a clerical error." Rather than undertaking to specify the appellants, counsel had made the conscious decision that the phrase "et al." was a sufficient designation. In contrast, Yturbide's instructions here were to include, in addition to the phrase "et al." in the styling, a specification of all the plaintiffs as appellants by name, but one was omitted through clerical inadvertence.

II. The motion is Tardy and in the Wrong Forum and Otherwise Procedurally Inapt and Futile

Although the foregoing should suffice to demonstrate the infirmity of the motion, we should briefly note the procedural shortcomings from which it suffers as well.

If a respondent is truly concerned as to whether an appeal might relieve a person not specified as an appellant, the prudent and proper procedure is affirmatively to seek a limiting determination by the appellate court it-

self by a motion to dismiss or the like, as in *Van Hoose* cited by defendant itself. The truth is that defendant here was not concerned about the acknowledged "oversight" until after the adverse decision against it. By then, of course, it was too late to try to lock the barn door because the complete and unqualified reversal had abolished the dismissal in its entirety and was accomplished in a manner affirmatively reflecting the intention to extend the relief to all interested parties, including Mr. Torres, whether or not specifically named as appellants on the Notice of Appeal.

The procedural hurdle defendant confronts because of its failure to act in time and in the proper forum is underscored by the unsuitability of the remedy it has now been forced to pursue. As is clear from the controlling rule itself, summary judgment is designed to oust a party because evidence countering his claim on the merits has eliminated every "genuine issue of material fact" on which he can hope to prevail on the merits through trial. (F. R. C. P., Rule 56(c)). That, of course, is not the basis on which defendant seeks relief, and, understandably, none of the cases it cites has entered a post-appeal summary judgment in the district court against a party on the ground that he was not specifically named on an appeal resulting in a decision favoring his claim on the merits.

In short, by tardy resort in the wrong forum to an unfit vehicle, defendant seeks revival as to a single plaintiff of an erroneous and abolished dismissal in defiance of the appellate court's disposition which defendant had an opportunity to oppose but did not take it, recognizing that a mere "oversight" of no consequence was involved.

Dated: August 26, 1985

Respectfully submitted:

GUNHEIM & YTURBIDE
KRAUSE, BASKIN, SHELL,
GRANT & BALLENTINE

/s/ BY: B. V. Yturbide
B. V. Yturbide
Attorney for Plaintiffs in
Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

DECLARATION OF B. V. YTURBIDE
IN OPPOSITION TO MOTION FOR
PARTIAL SUMMARY JUDGMENT
CONCERNING JOSE TORRES

(Case name omitted in printing)

I, B. V. YTURBIDE, declare under penalty of perjury that the following is true and correct:

(1) As one of the attorneys for Plaintiffs in Intervention (hereinafter "plaintiffs" in the above-entitled matter, I have personal knowledge of the facts stated below and could, if called as a witness, testify competently with respect thereto.

(2) I have been representing plaintiffs throughout their direct involvement in the matter, including the proceedings resulting from Judge Ingram's dismissal of their intervention action in 1981 and the appeal taken from that dismissal to the Ninth Circuit.

(3) From the inception, it was the intention of plaintiffs, duly reflected in their complaint in intervention, to join together with respect to the basic discrimination issues involved and to do so not only in the promotion of their respective individual interests, but also on behalf of absent members of a potential class. In its styling, their complaint added the phrase, "individually and on behalf of all others similarly situated." By the allegations in the body of the complaint, the potential involvement of a class action and the desire of plaintiffs to pursue one were made clear.

(4) The reasoning of Judge Ingram resulting in the dismissal and the ensuing appeal did not separate plaintiff Jose Torres from the others in any way or involve any individual variations among the plaintiffs but was addressed to basic, over-all considerations which would affect alike plaintiffs as a group and, for that matter, absent members of the same class as well.

(5) Accordingly, each of the plaintiffs alike, including Jose Torres, intended to pursue the appeal from the dismissal ruling as a whole not only for himself, but also for the rest of the group and for absent members of the potential class, and it was my intention so to reflect in the Notice of Appeal I caused to be typed and filed, a true copy of which is attached hereto as Exhibit A and made a part hereof. The notice was typed by my secretary at the time, Patricia G. Pedersen, whom I had found to be extraordinarily reliable over a period of many years. My detailed dictation to her dealt with the substantive part of the notice which would follow the styling and the designation of the appealing parties, and I gave her explicit instructions as to how the notice should be styled and the naming of the appellants. My instructions were that the styling should include the name of the plaintiff whose surname was first in alphabetical sequence, followed by the phrase "et. al.," and that then, at the beginning of the notice itself, all the plaintiffs were to be specifically designated as appellants by copying their names as appearing in the Complaint in Intervention. Ms. Pedersen intended to follow those instructions but, purely through clerical inadvertence, did not include the name of Jose Torres in the course of copying from the complaint. The likely explanation of the inadvertence is, I

believe, to be found in the fact that the plaintiffs listed in the complaint included fifteen persons with Spanish surnames and three with the first name "Jose." In all events, neither I nor anyone ever indicated to Ms. Pedersen in any way that Mr. Torres was to be omitted from the specification of appellants. Her own sworn declaration corroborating the foregoing has been obtained and is attached hereto as Exhibit B and made a part hereof.

(6) I am unaware of any indication whatsoever that the clerical error (which was perpetuated when the names as appearing on the Notice of Appeal were incorporated in the Certification of Parties Interested in the Appeal) has ever been harmful to anyone in any way. In particular, there is nothing to indicate that it misled either defendant or the appellate court or otherwise improperly influenced the appeal. To the contrary, defendant, who first became aware of the inadvertent omission of Mr. Torres' name from the Notice of Appeal and Certification of Interested Parties, called attention to it and its innocent cause in the Brief for Appellee. The pertinent footnote in that brief, a true copy of which is attached hereto as Exhibit C and made a part hereof, made no pretense of an intention to omit naming Mr. Torres as an appealing and interested party, and expressly recognized that his name had not been included "apparently by oversight." Neither before nor after the omission was thus noted did anything occur causing the status of Mr. Torres to influence the course of the appeal. The issues argued and resolved on the appeal were not of varying individualized concern but were of general and the same concern to all the plaintiffs and to absent members of the potential class.

(7) At no time during the appeal did defendant, whether by motion to dismiss or otherwise, initiate any proceeding designed to assure that Mr. Torres would not be considered a party interested in the appeal and entitled to the benefit of any favorable outcome which might ensue. Indeed, although the aforementioned footnote in the Brief for Appellee called attention to the omission, nothing was said in that footnote or elsewhere to suggest that defendant opposed the Court's consideration of Mr. Torres as an involved party, let alone that defendant was moving, or intended to move, for a dismissing determination by the Court as to him. As far as the Court was given to understand, defendant was not concerned about the acknowledged "oversight."

(8) On the other hand, it was my judgment that no affirmative steps on my part in the appellate court to assure the continuing viability of the appeal as to Mr. Torres was necessary or wise in the circumstances. As I assess the situation, it embraced the following elements:

(a) The action was such that the Notice of Appeal had representative potential to protect interested persons not specifically named as appellants, including Mr. Torres;

(b) Defendant not only had itself acknowledged that the omission was the result of mere "oversight," but had refrained from assuming a threatening posture in the matter;

(c) The "oversight" would readily be recognized as a purely technical one of no harmful consequence to anyone in view of the generalized issues involved;

(d) Denial to Mr. Torres of any relief forthcoming on the appeal would in all likelihood be regarded as par-

ticularly harsh since entirely absent persons of the same class would benefit from that relief; and

(e) Altogether, as things stood, the Court, if ultimately reversing the dismissal, would not be inclined to single out Mr. Torres but would reverse in a fashion beneficial to all interested persons in general, including him, whereas an effort by me to file a late Notice of Appeal as to him or the like would be regarded as a self-confession that such notice was essential to his sharing in the relief and/or might otherwise serve to give undue importance to a matter about which nobody, including defendant, appeared to be concerned at the time.

(9) My judgment proved correct. The Court not only reversed the judgment of dismissal as a whole, without qualification as to Mr. Torres or anyone, but also went out of its way to do so in a manner indicating an intention to benefit him and other interested persons not specifically named as appellants. In styling its opinion, after naming the appellants as specified on the Notice of Appeal, the Court added an important phrase not appearing on the notice but in keeping with the Complaint in Intervention. The added phrase is "individually and on behalf of all others similarly situated." True copies of the reversing order and of the first page of the opinion are attached hereto as, respectively, Exhibit D and Exhibit E and made a part hereof.

(10) Defendant has suffered no prejudice with respect to Mr. Torres. In the certiorari proceeding before the Supreme Court, defendant for the first time argued in passing that the case remain dismissed as to Mr. Torres notwithstanding the Ninth Circuit's decision. It seemed

obvious to me that no fit occasion for debating the point was presented, and, in any event, no harm to defendant could have come from the lack of responsive comment on a matter which was not, and was not claimed to be, germane to whether or not the Supreme Court should intercede. On fit occasion plaintiffs have certainly not hesitated to make their opposing view known, as, for example, in their statement for the status conference held on March 14, 1985, a true copy of which is attached hereto as Exhibit F and made a part hereof. Since the remand, neither in discovery nor otherwise has defendant been led to handle Mr. Torres other than as one of the ongoing plaintiffs. He was deposed by defendant along with the rest of plaintiffs.

(11) Rather than being prejudiced by the continued involvement of Mr. Torres in the case, defendant is even now endeavoring to benefit from it. In support of its pending Motion for Partial Summary Judgment Concerning § 1981 and NLRB Jurisdiction, defendant relies on part of Mr. Torres' deposition taken on May 7, 1985. A true copy of the portion of defendant's memorandum in that respect is attached hereto as Exhibit G and made a part hereof.

Executed this 26th day of August, 1985, in the City and County of San Francisco, State of California.

/s/ B. V. Yturbide
Attorney for Plaintiffs in
Intervention

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(Case title omitted in printing)

File No.: _____

CIVIL ACTION NO. C-75-0060 WA

NOTICE OF APPEAL

(Filed September 2, 1981)

NOTICE IS HEREBY GIVEN that plaintiffs in intervention, JOAQUIN MORELES BONILLA, ARMAND CARDENAS, ENRIQUE CARDENAS, HELIODORO CARDENAS, BENJAMIN CEJA, JOSE GUZMAN, JOSE LOPEZ, LUIS MAGALLON, OCTAVIO MARQUEZ, RAUL MENDEZ, GILBERTO PALAFOX, JOEL PINEDO, FELIX R. SANCHEZ, JESUS SANCHEZ, and CURTIS STREDIC, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in this action on the 31st day of August, 1981.

Dated: September 29, 1981.

**B. V. YTURBIDE
GUNHEIM & YTURBIDE**

By: /s/ B. V. Yturbide
Attorneys for Intervenors

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

**DECLARATION OF
PATRICIA G. PEDERSEN**

(Case title omitted in printing)

I, PATRICIA G. PEDERSEN, declare under penalty of perjury that the following is true and correct:

I now live in Utah but worked for twenty years or so in San Francisco, California, as a Legal Secretary for the firm of which B. V. Yturbide was a partner. During that employment, I typed the Notice of Appeal which was taken in 1981 by the Plaintiffs in Intervention in the above-entitled matter. In accordance with Mr. Yturbide's instructions at the time, I understood that, in naming the persons on whose behalf the notice was being filed, I was to include all the persons named as Plaintiffs in Intervention in the Complaint in Intervention, and I tried and intended to copy and include all those names, although I subsequently learned that I omitted Jose Torres from the list. The omission was completely inadvertent, without any indication from anyone that Mr. Torres was to be treated differently from the other Plaintiffs in Intervention and was not to be included among the appellants or that he was no longer interested in pursuing the case or anything of that kind.

Executed this 17th day of August, 1985, in Murray,
Utah.

/s/ Patricia G. Pedersen

EXHIBIT C

EXCERPT FROM BRIEF OF APPELLEE IN THE
NINTH CIRCUIT RE JOSE TORRES

The complaint in intervention filed January 20, 1981, (CR 81) contained no specific allegations of discrimination with respect to the sixteen³ intervenors, but incorporated the allegations of the first amended complaint, none of which specifically pertained to them. It further charged that after the original action was filed, the defendants engaged in conduct continuing prior discrimination and used "fraudulent and malicious ruses and devices by which to lull and mislead" the class by giving "the appearance of attempting to improve the situation."

In response to appellants' attempt to intervene, Oakland Scavenger Company and Local 70 filed, among other things, motions to dismiss and for summary judgment. (CR 59, 61, 62, 63, 65, 70, 71, 72, 75, 76, 77, 84 and 85). Hearing on these motions was put over until after the complaint in intervention was filed on January 20, 1981. Among the grounds asserted by Oakland Scavenger Company were that neither Section 1981 nor Title VII applied to the private, unadvertised sale of corporate stock, and that stockholders enjoyed a proprietary right, protected under the Fifth Amendment, to preference in job selection and compensation. (CR 61; CR 62) The company also claimed that Section 1981 applied only to discrimination on the basis of race and did not apply to this case, where all

³ Notice of Appeal has not been filed on behalf of the sixteenth person, Jose Torres, whose name, apparently by oversight, never appeared in the caption. He is not listed by appellants as a person interested in the outcome.

stockholders were persons of Italian ancestry and all share purchases were made either by members of the shareholders' families or by the company itself, making national origin or

EXHIBIT D

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

JOAQUIN MORELES BONILLA, et al.,)

Plaintiffs in)
Intervention,)

vs.)

OAKLAND SCAVENGER COMPANY,)
et al.,)

Defendants.)

PERFECTO MARTINEZ, et al.,)
Plaintiffs,)

vs.)

OAKLAND SCAVENGER COMPANY,)
et al.,)

Defendants.)

No. 81-4522
(Filed Feb.
28, 1983)DC CV 75-
0060 WAI

APPEAL from the United States District Court for
the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY

ATTEST FEBRUARY 25, 1983
PHILLIP B. WINBERRY
Clerk of Court

By: Carmen Lyle
Filed and entered November 9, 1982

EXHIBIT E

Joaquin Moreles BONILLA, Armando Cardenas, Enrique Cardenas, Heliodoro Cardenas, Benjamin Ceja, Jose Guzman, Jose Lopez, Luis Magallon, Octavio Marquez, Raul Mendez, Gilberto Palafox, Joel Pinedo, Felix R. Sanchez, Jesus Sanchez, Curtis Stredic, individually and on behalf of all others similarly situated. Plaintiffs in Intervention.

v.

OAKLAND SCAVENGER COMPANY, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American, Local 70, Defendants.

Perfecto MARTINEZ, et al., Plaintiffs,

v.

OAKLAND SCAVENGER COMPANY, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 70, Defendants.

No. 81-4522.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 12, 1982

Decided Nov. 9, 1982.

As Amended on Denial of Rehearing
and Rehearing En Banc
Feb. 17, 1983.

Black and Spanish-surnamed employees brought class action discrimination suit against their employer and union. The United States District Court for the Northern District of California, William A. Ingram, J., dismissed and plaintiffs appealed. The Court of Appeals, Farris, Circuit Judge, held that: (1) allegations of discrimination against minority nonshareholder employees stated a valid basis for seeking relief under Title VII and section 1981; (2) the employer committed a prima facie violation of Title VII by limiting share ownership to persons who were of Italian ancestry and were either members of the family or close friends of a current shareholder and by giving the better jobs with higher pay and more guaranteed hours to the shareholder employees, and (3) if the union acquiesced in or joined in the employer's discriminatory practices, it too was liable to the injured employees.

Reversed and remanded.

1. Federal Civil Procedure 2533
Federal Courts 894

District court committed reversible error when it considered matters extraneous to pleadings while treating motion as one to dismiss, rather than as one for summary judgment. Fed.Rules Civ.Proc. Rules 12(b)(6), 56(b), 28 U.S.C.A.

2. Civil Rights 13.12(3), 42

Allegation of discrimination against minority non-shareholder employees stated valid basis for seeking relief under Title VII and section 1981. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

3. Civil Rights 44(1)

Disparate impact theory of proving discrimination is unavailable if racial imbalance among employees in preferred jobs is due to facially neutral bona fide seniority system. Civil Rights Act of 1964, § 703(h) as amended 42 U.S.C.A. § 2000e-2(h).

4. Federal Civil Procedure 2497

In employment discrimination suit, issue of material fact existed as to whether employer intended to prefer white nonshareholder employees over black and Spanish-surnamed nonshareholder employees, precluding summary judgment on disparate impact claim. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

5. Civil Rights 9.10

Employer's limiting share ownership to persons who were of Italian ancestry and who were either members of family or close friends of current shareholders and assignment of better jobs with higher pay and more guaranteed hours to shareholder employees was condition of employment subject to mandate of Title VII. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

(case title omitted in printing)

Case No. C-75-0060 CAL

STATUS CONFERENCE STATEMENT

(Local Rule 235-3)

This action was commenced on January 10, 1975, by five named plaintiffs who have since settled and been dismissed. The essence of the action was that certain driving positions within the teamsters bargaining unit at Oakland Scavenger Company were held exclusively by the company's owners, all of whom were persons of Italian ancestry. Those positions, now referred to as Head Route Driver positions, were among the most highly compensated in the bargaining unit. Plaintiffs claimed that the system that allowed the company's owners to control those positions was discriminatory on grounds of race and national origin under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

After settlement and dismissal of the original plaintiffs on April 2, 1980, sixteen Hispanic or Black employees intervened. On Defendant's motion, the action was dismissed on August 31, 1981. The Ninth Circuit subsequently reversed and the Supreme Court denied certiorari.

There are currently 100 Head Route Driver positions, roughly one-half of which are filled by the company's

owners. All Head Route Driver positions are filled by seniority bid, but the company has a "right of assignment" which permits it to transfer a stockholder-Head Route Driver from one route to another. These are lateral operational transfers involving no change in compensation. The collective bargaining agreement with Teamsters Local 70 does not permit the company to similarly transfer non-stockholder-Head Route Drivers.

The court had continued the trial setting of this case pending the outcome of the action entitled *John Ferro v. Oakland Scavenger Company*, Alameda County Superior Court Case No. 570202-8. That case involved a claim by one of the company's owners that a portion of the pay received by shareholders in the Head Route Driver position is properly a dividend rather than compensation for services. A seven week trial of that case resulted in a hung jury. After discharge of the jury, the trial court ruled that the action was barred by the statute of limitations. Judgment was entered on February 25, 1985, and the Plaintiff has until April 26, 1985, to appeal. If the Plaintiff appeals, the final resolution may have some bearing on the issues in this case.

(a) *Service of Process.* There are no parties yet to be served.

(b) *Jurisdiction and Venue.* Plaintiff claims jurisdiction under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981. There may be questions concerning the exhaustion of administrative remedies by the intervening plaintiffs, as well as issues concerning the

applicability of Section 1981 to claims of private discrimination. There will also be questions concerning the applicability of these statutes to stock ownerships and the rights of stockholders in Oakland Scavenger Company, depending upon the issues raised by plaintiffs. Furthermore, no notice of appeal was filed on behalf of one of the sixteen intervening plaintiffs, Jose Torres, and he was not listed as a party having an interest in the outcome of the case pursuant to Ninth Circuit Court of Appeals Rule 13(e). Therefore, the action as to him should stand as dismissed. Venue is proper.

(c) *Substance of the Parties' Claims and Defenses.* The structure of the company and relative positions of the parties has changed substantially since this action was originally filed. There has been no significant discovery since approximately 1977. All activity of the parties has been related to settlement negotiations, motion matters and appeals. The company's previous attorney, Mr. Edward Moore, died in November, 1980, just prior to the motion to dismiss. We anticipate that the parties will have to redefine their respective claims and defenses based on the events of the intervening period and further discovery.

(d) *Anticipated Motions.* Defendant intends to make a motion for summary judgment to dismiss Jose Torres, one of the sixteen intervening plaintiffs, who did not file a notice of appeal. I have spoken with Mr. Yturbide, counsel to plaintiffs, who intends to pursue discovery relating to class certification as the first order of business.

(e) *Anticipated or Remaining Discovery.* Defendant intends to take depositions of all the intervening

plaintiffs and may have additional discovery in connection with those depositions. We are investigating changes in the company's work force, structure and employment practices from approximately 1972 to the present. No limitations on discovery are needed or appropriate at this time.

(f) *Further Proceedings.* We anticipate that twelve months will be needed to prepare for trial and suggest setting a trial date in 1986. We will begin contract negotiations with the Teamsters Local 70 and Warehousemen, Local 6, in June 1985. Previous negotiations of three year contracts lasted three months and required over twenty five meetings between the parties. In addition I have a complex class action set for trial in November, 1985. That action commenced in September, 1975, and we do not expect a continuance of the trial date.

(g) *Appropriateness of Special Procedures.* This action is appropriate for bifurcation of liability and damage questions.

The liability issue is complex and may take four to eight weeks to try. Any damage issue may be largely computational and might be properly referred to a master, if such becomes necessary.

(h) *Modifications of the Standard Pretrial Procedures.* No modification of the standard pretrial procedures is proposed at this time.

(i) *Prospects for settlement.* No settlement discussions are anticipated in the near future, and settlement appears unlikely at this time.

Dated: March 1, 1985

MOORE, SIZOO, CANTWELL
& McKAE

By: /s/ Stephen McKae
Attorneys for Defendant
Oakland Scavenger Company

EXHIBIT G

EXCERPTS FROM DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING § 1981 AND NLRB JURISDICTION RE JOSE TORRES

is not a shareholder, isn't he?

A. He's the only one; the only other one

Q. He's the only other one?

A. Yes

Q. In West Oakland?

A. Right, in Oakland . . .

Q. He's paid the same way you are?

A. Yes

Q. And he's Italian in origin; is that right?

A. His last name is Italian. I don't know if he came from there or not.

(Deposition of Joel Pinedo, page 11, lines 3 through page 12, line 7, attached to the Declaration of Stephen McKae as Exhibit D).

Similarly, plaintiff in intervention Jose Torres stated in his deposition that the other nonowners, including whites and Italians, have the same opportunities as he. (Deposition of Jose Torres, page 14, lines 9-18, attached to the Declaration of Stephen McKae as Exhibit E).

ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A party against whom a claim is asserted may, at any time, move for summary judgment with respect to all or any part of the claim. Federal Rule of Civil Procedure 56(b). If the pleadings, depositions, and papers on file show that "... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ..." the motion should be granted. Federal Rule of Civil Procedure 56(e).

In ruling on a motion for summary judgment, the allegations in the complaint are not controlling. The court must consider

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060-CAL

REPLY MEMORANDUM OF DEFENDANT OAKLAND SCAVENGER COMPANY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: JOSE TORRES

(Filed Sept. 8, 1985)

(Case title omitted in printing)

Plaintiffs' opposition to defendant Oakland Scavenger Company's motion for summary judgment regarding Jose Torres fails to respond adequately on two points. The first is that individual Plaintiffs pursuing an appeal must each file a timely notice of appeal. The argument that the characterization of the action as a potential class action protects named plaintiffs who do not appeal has no merit. No class had been certified and no class representatives designated.

The second point is that plaintiffs in intervention were advised by defendant Oakland Scavenger Company of the omission of Jose Torres from the appeal in the opening brief on appeal and ignored that omission. At no time did plaintiffs request leave to amend the notice of appeal and correct what they now refer to as an oversight. For these reasons and the reasons set forth in our opening

memorandum, defendants motion for summary judgment regarding Jose Torres should be granted.

Dated: August 30, 1985

Respectfully submitted,

MOORE, SIZOO, CANTWELL
& McKAE

/s/ Carol A. Malenka

(Certificate of service omitted in printing)

REMARKS OF COURT AT TIME OF RULING APPEALED FROM [Reporter's Transcript, December 6, 1985 at pages 4-8]:

The Court: Please.

Now, with respect to defendant, Oakland Scavengers, motion regarding Mr. Torres, I am a little puzzled as to what the powers are here. First of all, correct me if I'm wrong that this is the state of the record: Mr. Torres was a plaintiff before the matter was ruled upon by the prior judge in this case?

. . .

The Court: Judgment was entered against Mr. Torres. Then the matter went up on appeal. And Mr. Torres was for some reason not included as one of the appealing parties. The 9th Circuit reversed the decision of the prior judge and sent it back here.

I think on that state of the record that Mr. Torres is no longer a party to the case. If he didn't appeal the judgment against him, seems to that judgment is final.

Now, if the problem is one of inadvertence in Mr. Torres' name not being included in the list of appellants in the 9th Circuit, seems to me it has to be the plaintiffs' burden here to attempt to get that inadvertent error corrected in the 9th Circuit.

There are procedures to do that. You can move to recall or remand to correct clerical error, that kind of thing, which is within the inherent power of the court, but not my inherent power. I don't have the power to correct it.

What do you think about that?

• • •

You know, it may be on that state of the record that Mr. Torres may still be a member of the class you seek to represent, assuming that I certify a class.

• • •

It may be you can make an agreement with the other plaintiffs if there is a recovery he shares in it. But I don't have any power to do anything about it on the present state of the record.

That is just standard class action language.

• • •

It may be, Mr. Yturbide. I am going to rule here that on the present state of the record I am of the opinion and conclusion Mr. Torres is not presently a named plaintiff.

Now, if that was because of inadvertence in the proceedings before the 9th Circuit, you are going to have to go to the 9th Circuit to seek relief of that. I am leaving totally open the question of whether Mr. Torres may be a member of a class, assuming there is a class, or may be represented by somebody else. But I think on the present state of the record that Mr. Torres is not presently a plaintiff.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 75-0060 CAL

ORDER MODIFYING, ORDER GRANTING
SUMMARY JUDGMENT AGAINST JOSE TORRES

(See Appendix B to Petition for Certiorari, B1-B4)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 75-0060 CAL

NOTICE OF APPEAL

(Filed November 27, 1985)

(Case title omitted in printing)

NOTICE IS HEREBY GIVEN that plaintiff-in-intervention JOSE TORRES appeals to the United States Court of Appeals for the Ninth Circuit from the order granting summary judgment against Jose Torres entered in this action on October 31, 1985.

Dated: November 27, 1985

GUNHEIM AND YTURBIDE
KRAUSE, BASKIN, SHEILA,
GRANT & BALLENTINE

By: /s/ B. V. Yturbide
B. V. Yturbide
Attorneys for Plaintiff-in-
Intervention Jose Torres

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PERFECTO MARTINEZ, et al.,

Plaintiffs,

v.

OAKLAND SCAVENGER COMPANY,
et al.,

Defendants.

JOAQUIN MORALES BONILLA,
et al.,

Plaintiffs-In-Intervention,

v.

OAKLAND SCAVENGER COMPANY,
et al.,

Defendants.

No. C-75-0060-
CAL

ORDER REGARDING CLASS DETERMINATION
AND OTHER PROCEEDINGS

(Filed February 21, 1986)

Plaintiffs-in-intervention filed a motion for determination of a class under Rule 23(c)(1) of the Federal Rules of Civil Procedure. The motion was opposed by defendants and was argued and submitted for decision. The court has reviewed the moving and opposing papers, the record in the action, and the applicable authorities.

IT IS ORDERED as follows:

1. This action may be maintained as a class action. The class is defined as: All black and all Hispanic surnamed persons who on or after January 10, 1972, have been employees of defendant Oakland Scavenger Company. The term "employees" includes persons in the so-called "casual pool."

2. The court finds pursuant to Rule 23(a) that: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law and fact common to the class; (3) the claims of the representative plaintiffs are typical of the claims of the class; (4) the representative plaintiffs and their counsel will fairly and adequately protect the interests of the class.

3. The Court finds pursuant to Rule 23(b)(1)(B) that the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would be a practical matter be depositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

4. The court finds pursuant to Rule 23(b)(2) that the parties opposing the class have allegedly acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, if the allegations are proved.

5. The determination of the class is conditional, pursuant to Rule 23(c)(1).

6. The court further finds, based upon the present record, that because of the nature of the allegations, there is at present no reason to distinguish for class determination purposes among class members who were or were not members of the various unions representing the employees of defendant Oakland Scavenger Company. But the court will give further consideration to this question on any motion for subclasses or later motion by defendants.

7. All discovery will be concluded by April 30, 1986.

8. The pretrial conference will be on July 7, 1986, at 3:00 o'clock.

A. The trial will be on July 21, 1986, at 9:00 a.m. o'clock.

Dated: February 18, 1986.

/s/ Charles A. Legge
CHARLES A. LEGGE
UNITED STATES DISTRICT
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4522

DC # CV-75-0060-CAL
Northern California

ORDER

(Filed April 14, 1986)

(See Appendix E to Petition for Writ of Certiorari)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2517*

DC # CV-75-0060-CAL

No. 85-2903**

DC # CV-75-0060-CAL

MEMORANDUM***

(Filed December 11, 1986)

(See Appendix A to Petition for Writ of Certiorari)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2903

ORDER

(Filed February 13, 1987)

(See Appendix C to Petition for Writ of Certiorari)

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2903

DC CV-75-0060-CAL

(Filed February 26, 1987)

(See Appendix D to Petition for Writ of Certiorari)

Filed and entered December 11, 1986

PETITIONER'S BRIEF

(4)
No. 86-1845

FILED
NOV 27 1987
JOSEPH F. SPANIOLO, JR.,
CLERK

In The
Supreme Court of the United States

October Term, 1987

— o —
JOSE TORRES,

Petitioner,

vs.

OAKLAND SCAVENGER COMPANY,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
and HELPERS OF AMERICA, LOCAL NO. 70,

Respondents.

— o —
On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

— o —
BRIEF FOR PETITIONERS

— o —
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QUESTIONS PRESENTED

Whether, in providing for specification in a timely notice of appeal of the party or parties taking the appeal, Rule 3(c) of the Federal Rules of Appellate Procedure lays down a jurisdictional requirement to be strictly and absolutely applied as the say-all-end-all measure of the appellate court's power to grant relief regardless of whether there may be circumstances calling for relaxation of the rule or for exercise of overriding inherent power?

Whether the doctrine of harmless error honored in Rule 61 of the Federal Rules of Civil Procedure applies to appellate proceedings as well as those in district courts?

Whether, in a potential but uncertified class action for employment discrimination, the representative effect of appeals by active class members protects not only entirely absent and passive members but also a member theretofore active in the litigation?

Whether, under the exceptional circumstances involved, the disposition below harshly makes procedural technicality the master of substance and disregards the rule called for by this Court's teaching, other cogent authorities, and the dictates of sound policy and fairness?

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Petitioner Jose Torres (hereinafter "Torres") urges that the decision of the Court of Appeals for the Ninth Circuit affirming the summary judgment entered in the district court against him be reversed as erroneous in multiple and important respects conjoining to put it at odds with sound law and policy and the dictates of basic fairness.

OPINIONS AND ORDERS BELOW

Reversal is sought as to only a relatively small part of the opinion of the court of appeals, which, in the main, dealt with an appeal treated as related to petitioner's but raising different issues and none of importance here. The portion of the opinion now pertinent is reproduced in Appendix A to our Petition for Writ of Certiorari (hereinafter sometimes "Pet. for Cert."). The order of the district court modifying an earlier one and granting summary judgment against petitioner is reproduced in Appendix B to our petition for certiorari. The order of the court of appeals denying the petition for rehearing and rejecting a suggestion of rehearing en banc is reproduced in Appendix C to that petition. The judgment of the court of appeals is reproduced in Appendix D to to the petition. The order of the court of appeals denying a motion for recall of its mandate in a prior appeal, amendment of the notice of that appeal, and/or other appropriate relief is reproduced in Appendix E to the petition.

JURISDICTION

The opinion of the court of appeals was filed on December 11, 1986. The timely petition for rehearing and suggestion of rehearing en banc were denied and rejected on February 12, 1987, and our certiorari petition was filed within ninety days of that date. Certiorari was granted on October 13, 1987. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

— o —

PROVISIONS OF LAW AND RULES INVOLVED

This case involves Title 42 U.S.C. § 1981, R.S. § 1977; § 703, Title VII, of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-2); Rule 3(c), Federal Rules of Appellate Procedure; Rule 61, Federal Rules of Civil Procedure; and Rule 10.4 of this Court's Rules. The pertinent provisions of the same are set forth in Appendix F to our petition for certiorari.

— o —

STATEMENT OF THE CASE

A. Commencement of the Underlying Action and Jurisdiction in the District Court

An underlying action against respondents was initiated by five persons other than Torres as present or past employees of the company and dues-paying members of the union. By their complaint and first amended complaint, on behalf of themselves individually and of the class

of persons similarly situated, the original plaintiffs, two of them black and three Spanish-surnamed, invoked the district court's jurisdiction under the provisions condemning employment discrimination based on race or national origin in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq., and in the Civil Rights Act of 1866, 42 U.S.C. § 1981. They alleged that the company engaged in intentional, systematic employment discrimination based on race and national origin and that the union was complicit in the matter. By their answers, respondents denied the material allegations against them and raised affirmative defenses. (J.A. 3-81.)

B. Intervention by Torres and Others After Settlement by the Original Plaintiffs

The five original plaintiffs and respondents negotiated a settlement but only as to the claims of those plaintiffs individually. Although a class action had not yet been certified, it was agreed as part of the consideration bargained for, in addition to a payment of \$50,000 to the plaintiffs, that any claims of persons similarly situated would remain unaffected, that absent members of the potential class would be given a reasonable opportunity to intervene and pursue the action, and that appropriate notice to that end would be published and mailed. The settlement was approved by the district court, including the notice to be used, which was then published and mailed. As a result of that notice, fifteen Spanish-surnamed persons, including Torres, and one black person filed a motion to intervene as plaintiffs. (R. 48-54, 56-57.)

Although strenuously opposed by respondents, the motion to intervene was granted. (R. 68.) The ensuing

complaint in intervention filed jointly by Torres and the other intervenors incorporated the operative allegations of the first amended complaint. It then added allegations that the unlawful employment practices and policies complained of therein had continued, that the intervening plaintiffs were among the black and Spanish-surnamed employees and union members injured, and that they were proceeding with the action not only on their own behalf but on behalf of the persons similarly situated as well. (J.A. 82-85.)

C. The Erroneous Dismissal and Successful Appeal

Respondents renewed their attack on the intervention by motions to strike, to dismiss, and for summary judgment. (R. 70-71, 74-77, 80, 84-85.) Notwithstanding the opposition by plaintiffs, (R. 66, 82), the court granted the motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground of a failure to state a claim warranting relief, and judgment dismissing the action was entered accordingly. (R. 87-88.) An appeal to the court of appeals (contested by respondent company but not the union) was then noticed and resulted in reversal and remand (R. 98, 108), in a decision reported in 697 F.2d 1297 (1982). Respondent company sought review by this Court on certiorari but without success. (R. 110-111, 120.)

D. The Showing of the Parties on the Summary Judgment Motion Involved Here

On the remand, after various other proceedings in the district court, respondent company made a motion, later adopted by the union and opposed by plaintiff, for summary judgment dismissing the action as to Torres on the

ground that he was not specified as an appellant in the notice of appeal from the erroneous dismissal. (J.A. 95-144.) The facts before the district court on the motion in question (as distinguished from their proper legal import) were without dispute and, indeed, consisted of matter previously of record to a substantial extent. The company simply established that Torres had not been specified as an appellant in the notice of the prior appeal, had not been listed as an interested party in the brief of appellants, and had not sought to file a late notice of his own during the appeal. (J.A. 101-106.) The union made no presentation.

The factual considerations in opposition to the motion were set forth in the declaration and supporting exhibits submitted by counsel for plaintiffs, B.V. Yturbide, who had represented them throughout their involvement in the action. (J.A. 124-142.) Those considerations were not controverted and included the following:

1. The Representative Nature of the Action

From the inception, it was the intention of plaintiffs, duly reflected in their complaint in intervention, to join together with respect to the basic discrimination issues involved and to do so not only in the promotion of their respective individual interests, but also on behalf of absent members of a potential class. In its styling, their complaint added the phrase, "individually and on behalf of all others similarly situated." By the allegations in the body of the complaint, the potential involvement of a class action and the desire of plaintiffs to pursue one were made clear. (J.A. 124; see also R. 81.)

2. *The General and Commonly Adverse Dismissal*

The reasoning of the district court leading to the dismissal did not separate Torres from the others in any way or involve any individual variations among the plaintiffs but was addressed to basic, overall considerations which would affect alike plaintiffs as a group and, for that matter, absent members of the same class as well. (J.A. 125; see also R. 87-88.)

3. *The Omission Contrary to Intent and Through Clerical Inadvertence*

Accordingly, each of the plaintiffs alike, including Torres, intended to pursue the appeal from the dismissal ruling as a whole not only for himself, but also for the rest of the group and for absent members of the potential class, and it was Yturbide's intention so to reflect in the notice of appeal he caused to be typed and filed. However, purely through clerical inadvertence by Yturbide's secretary, Torres' name was omitted from the notice of appeal. In its styling, the notice set forth the name of the plaintiff first in sequence, followed by "et al." Then, at the beginning of the notice itself, the intention was to list all the plaintiffs-in-intervention in alphabetical sequence, and this was done as to fifteen of them, but Torres was not named due to clerical inadvertence. (J.A. 125-126, 131; R. 98.)

4. *A Mere "Oversight" Without Harm on the Appeal*

There is no indication that the clerical error (which was perpetuated when the names as appearing on the no-

tice of appeal were incorporated in the certification of parties interested in the appeal) has ever been harmful to anyone in any way. In particular, there is nothing to indicate that it misled either respondent or the court of appeals or otherwise improperly influenced the appeal. To the contrary, respondent company, who first became aware of the inadvertent omission of Torres' name from the notice of appeal and certification of interested parties, called attention to it and its innocent cause in the brief for appellee. The pertinent footnote in that brief made no pretense of an intention to omit naming Torres as an appealing and interested party and expressly recognized that his name had not been included "apparently by oversight." Neither before nor after the omission was thus noted did anything occur to suggest that Torres was not to be treated as actually involved and interested in the appeal. The issues argued and resolved on the appeal were not of varying individualized concern but were of general and the same concern to all the plaintiffs and to absent members of the potential class. (J.A. 126-127; see also opinion reported in 697 F.2d 1297 (1982).)

5. *Respondent's Lack of Concern*

At no time during the appeal did respondent, whether by motion to dismiss or otherwise, initiate any proceeding designed to assure that Torres would not be considered a party interested in the appeal and entitled to the benefit of any favorable outcome which might ensue. Indeed, although the aforementioned footnote in the brief for appellee called attention to the omission, nothing was said in that footnote or elsewhere to suggest that respondent opposed the court of appeals' consideration of

Torres as an involved party, let alone that respondent was moving, or intended to move, for a dismissing determination as to him. As far as the court of appeals was given to understand, respondent was not concerned about the acknowledged "oversight." (J.A. 127, 132.)

6. *Yturbide's Reasons for Not Raising a Clamor at the Time*

On the other hand, it was Yturbide's judgment that no affirmative steps on his part in the court of appeals to assure the continuing viability of the appeal as to Torres was necessary or wise in the circumstances. As he assessed the situation, it embraced the following elements:

(a) The action was such that the notice of appeal had representative potential to protect interested persons not specifically named as appellants, including Torres;

(b) Respondent not only had itself acknowledged that the omission was the result of mere "oversight," but had refrained from assuming a threatening posture in the matter;

(c) The "oversight" would readily be recognized as a purely technical one of no harmful consequence to anyone in view of the generalized issues involved;

(d) Denial to Torres of any relief forthcoming on the appeal would in all likelihood be regarded as particularly harsh since entirely absent persons of the same class would benefit from that relief; and

(e) Altogether, as things stood, the court of appeals, if ultimately reversing the dismissal, would not be inclined to single out Torres but would reverse in a fashion bene-

ficial to all interested persons in general, including him, whereas an effort by Yturbide to file a late notice of appeal as to him or the like would be regarded as a self-confession that such notice was essential to his sharing in the relief and/or might otherwise serve to give undue importance to a matter about which nobody, including respondent, appeared to be concerned at the time. (J.A. 127-129.)

7. *The Unqualified Reversal*

It in fact developed that the court of appeals reversed the judgment of dismissal as a whole without qualification. (J.A. 128, 133; see also Ninth Circuit's opinion reported in 697 F.2d 1297 (1982).)

8. *Respondents' Lack of Prejudice and Attempt to Benefit From Torres' Continued Involvement*

Respondents have suffered no prejudice with respect to Torres. In the prior certiorari proceeding before this Court, respondent company for the first time argued in passing that the case remained dismissed as to Torres notwithstanding the Ninth Circuit's decision. It seemed obvious to Yturbide that no fit occasion for debating the point was presented, and, in any event, no harm to respondents could have come from the lack of responsive comment on a matter which was not, and was not claimed to be, germane to whether or not this Court should intercede. On fit occasion since the remand, plaintiffs certainly did not hesitate to make their opposing views known. Conversely, neither in discovery nor otherwise, did respon-

dents handle Torres other than as one of the ongoing plaintiffs until the motion for summary judgment against him. (J.A. 128-129; see also R. 124:p. 7.)

Rather than being prejudiced by the continued involvement of Torres in the case, respondents have even endeavored to benefit from it. For example, in support of a motion concerning merits issues in the case, reliance was placed on a part of his deposition taken after the remand along with those of the rest of the plaintiffs. (J.A. 129, 141.)

E. The Granting of the Summary Judgment Motion and the Lack of Success in the Court of Appeals

The district court granted the motion for summary judgment against Torres. (App. B to Pet. for Cert.) He then duly noticed an appeal to the Court of Appeals for the Ninth Circuit. (J.A. 148.) In addition and by way of pursuing an alternative remedy the court might deem preferable, he moved the court of appeals for recall of its mandate in the prior appeal, amendment of the notice of that appeal to name him, and/or other appropriate relief. That motion was denied without opinion. (App. E to Pet. for Cert.) In a subsequent brief on the appeal, Torres in effect renewed the recall motion, urging that proper disposition was optional and could take the form of either reversing the summary judgment without further fuss or also recalling its mandate and allowing amendment of the earlier notice of appeal or the like if that approach was regarded as more suitable. Without any further reference to the recall alternative, the court of appeals entered the opinion which, in part, disposed of Torres' appeal and affirmed the summary judgment against him. (App. A to Pet. for Cert.) Following his unsuccessful petition for a rehearing and suggestion of a rehearing en banc and the

entry of judgment accordingly (App. C and D to Pet. for Cert.), our certiorari petition was filed and was granted by this Court.

F. Developments in the Underlying Action

Nothing final has yet occurred in the underlying action pending in the district court. After the summary judgment against Torres, that court certified a class of plaintiffs, defined to include "all blacks and all Hispanic surnamed persons who on or after January 10, 1972, have been employees of defendant Oakland Scavenger Company." (J.A. 148-151.) Trial of the action was bifurcated and the liability phase began during pendency of Torres' appeal and has extended beyond disposition of that appeal. Although the parties have now concluded their introduction of evidence and summations, the court has not made its determination as of this date.

SUMMARY OF ARGUMENT

In affirming the summary judgment against Torres, the decision of the Court of Appeals we now challenge (hereinafter often "the present opinion") ignores the exceptional circumstances making that result unconscionable and sacrifices substantive justice and fairness on the altar of procedural perfection. In the process, expressly or by necessary implication, it disposes erroneously of three somewhat overlapping concerns which are of high and far-reaching importance.

First, the present opinion holds that, in providing for specification in a timely notice of appeal of the party or parties taking the appeal, Rule 3(c) of the Federal Rules of Appellate Procedure lays down a jurisdictional requirement to be strictly and absolutely applied as the invariable measure of an appellate court's power to grant relief, that

is, regardless of whether there are exceptional surrounding circumstances calling for relaxation of the rule or exercise of overriding inherent power to do justice.

Second, the present opinion rejects as inapplicable to appellate proceedings the doctrine of harmless error honored in Rule 61 of the Federal Rules of Civil Procedure and elsewhere.

Third, the present opinion holds that, in a potential but uncertified class action, even one for invidious discrimination in the vital field of employment, an appeal taken by some active class members is not representative in scope to the extent of protecting a member theretofore active in the litigation as well as entirely absent and passive class members.

Regretably, the perfunctory treatment with which the present opinion frustrates the interests of justice in the respects just mentioned and others is not without support in ill-considered opinions of a few Circuits in addition to the Ninth. However, the authorities and policy considerations worthy of allegiance but disregarded here are to the contrary. They include not only several decisions of other Circuits squarely in point and of the Ninth Circuit itself in analogous situations, but also the sound guidance to be found in this Court's decisions and even its own Rules. Overarching all are the dictates of basic fairness in the exceptional circumstances involved.

The simplest and most appropriate relief which should be granted Torres at this juncture appears to us to be a reversal with directions to remand the matter to the district court for his full reinstatement as one of the plaintiffs in intervention in the underlying action still pending there. Alternatively, if this Court deems that procedure preferable in advance of the remand to the district court, the

court of appeals can be directed to recall its mandate in the earlier appeal and amend the notice of that appeal to add Torres' name to the specification of the appellants.

—o— ARGUMENT

I. THE PRESENT OPINION'S JURISDICTIONAL APPLICATION OF RULE 3(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE TO AFFIRM THE SUMMARY JUDGMENT AGAINST TORRES IS ERRONEOUS AND UNJUST. IT CLASHES WITH SOUND AUTHORITY AND POLICY, INCLUDING THE TEACHING AND RULES OF THIS COURT, ABDICATES OVERRIDING INHERENT POWER TO DO JUSTICE, AND PRODUCES A RESULT UNCONSCIONABLE IN THE EXCEPTIONAL CIRCUMSTANCES INVOLVED AND NECESSITATING REVERSAL.

A. The Rigid Jurisdictional View Conflicts With Sound Decisions of Other Circuits Squarely In Point.

In a nutshell, the present opinion reaches the wrong result for the wrong reason.

The stark proposition for which it (App. A to Pet. for Cert.) unmistakably stands is that the say-all-end-all measure of whether courts of appeal have "jurisdiction" or "power" to grant relief is whether or not the one to be relieved has been specifically named in the notice of appeal as originally filed or as amended within the short time allowed for taking appeals. As is apparent from the cases the opinion cites, the absolute principle thus embraced is traceable to the requirement in Rule 3(c) of the Federal Rules of Appellate Procedure that "the party or parties" to an appeal be specified in a timely notice of appeal. (App. F to Pet. for Cert., p. 3.) Regardless of other

circumstances, no exception is made by the opinion even though it acknowledges the "clerical" error by which Torres was not specifically named as an appellant along with the fifteen intervening plaintiffs with whom he had commenced a potential class action for employment discrimination and who succeeded on the appeal in overturning the erroneous dismissal of the action. Relegated to immateriality are not only the clerical inadvertence but the representative potential of the notice of appeal filed, the commonality of appellate issues involved, the appellate relief obtained by even absent class members, and the complete harmlessness of the omission on and after the appeal for all concerned, including the opponent who realized from the start that nothing but a mere "oversight" of no importance to the issues on the appeal or of concern otherwise had occurred.

This rigid view is by no means a novel one but finds support (albeit in factual contexts different from the present one) in decisions not only of the Ninth Circuit but of the Fourth and Sixth Circuits as well. (E.g., *Farley v. Santa Fe Trail Transp. Co.*, (9th Cir. 1978) 778 F.2d 1365, 1368 et seq.; *Covington v. Allsbrook* (4th Cir. 1980) 636 F.2d 63 [cert. denied (1981) 451 U.S. 914]; *Van Hoose et al. v. Eidsen* (6th Cir. 1971) 450 F.2d 746, 747; *Cook and Sons Equipment, Inc. v. Killen* (9th Cir. 1960) 277 F.2d 607, 609.) Yet, at least in exceptional circumstances, it seems clear that a rule of such strictness can serve to give bare procedural ritual ascendancy over substance and reality, not to mention just plain fairness. There is not always a necessary relationship between all-inclusive specification and any important notice-giving objective of Rule 3(c). It can obviously happen, as here, that an appellee, realizing that a person no less interested than several co-parties

specified in the notice of appeal, has not been specified solely through inadvertence, processes the appeal in no different way and without any prejudice or concern by reason of the omission. Not surprisingly, therefore, the rigid approach is in conflict with decisions in several other circuits which have commendably taken a more discriminate and relaxed approach to Rule 3(c) where appropriate. In the context of multiple would-be appellants, persons unspecified in a timely notice have thus been accorded protection of an appeal, whether by dispositions without concern for actual amendment of the notice or by permitting such amendment belatedly, even after issuance of the mandate on the appeal. The exceptional circumstances forming the basis of such holdings include (a) the "clerical" inadvertence leading to the omission, (b) the commonality of the appellate issues, and/or (c) the lack of the opponent's adverse reliance on the omission or any other harm or prejudice to the appeal or the opponent. The rationale implicit in all those decisions and expressly voiced in some is that rigid application of Rule 3(c) in such circumstances would be unfair and work injustice. The holding in some appears to be that even the customary phrase, "et al.," is alone enough to satisfy the Rule, let alone, as here, use of that phrase plus specification of fifteen of sixteen co-parties. (*Ayres v. Sears Roebuck & Co.* (5th Cir. 1986) 789 F.2d 1173, 1177; *Harrison v. U.S.* (8th Cir. 1983) 715 F.2d 1311, 1312-13; *Smith & Assocs. v. Otis Elevator Co.* (5th Cir. 1979) 608 F.2d 126; *Williams v. Frey* (3rd Cir. 1977) 551 F.2d 932, 934; *Parrish v. Board of Com'rs.* (5th Cir. 1974) 505 F.2d 12, 16 [withdrawn on other grounds (1975) 509 F.2d 540]; see also *Brubaker v. Board of Education* (7th Cir. 1974) 502 F.2d 973, 983 [cert. denied (1975) 421 U.S. 965].)

Illustrative of the degree to which the strict view directly conflicts with the approach in other circuits is the decision in *Harrison* just cited. A person not originally specified as among the appellants had been omitted through clerical and harmless inadvertence. On remand following the successful appeal, the omitted person moved the district court for an order amending the original notice of appeal to include his name. The district court denied the motion on the ground that it lacked jurisdiction to grant such relief, and a second appeal ensued. Although agreeing that the district court lacked jurisdiction to permit the amendment, the appellate court, apparently on its own initiative, proceeded to treat the pending appeal as a motion to recall its mandate, recalled the mandate, and amended the original notice of appeal in order to prevent "manifest injustice." (715 F.2d at p. 1313.)

It is clear to us that the decisions shunning the hardship of overzealous enforcement of Rule 3(c) are the ones worthy of allegiance even without more than their own cogency. There are, however, several additional considerations underscoring the improvidence of the jurisdictional view embraced by the present opinion.

B. The Rigid Jurisdictional View Clashes With This Court's Teaching and Rules and Other Sound and Closely Analogous Decisions.

(1) The Clash With This Court's Decision in *Foman*

The strict view is clearly out of harmony with this Court's holding and general guidance in a closely analogous case, *Foman v. Davis, Executrix* (1962) 371 U.S. 178, 181-82. An appeal from a judgment was there held allowable even though the only valid notice

of appeal had not specified it as appealed from. This Court reasoned that, in view of the circumstances involved, the defect "did not mislead or prejudice the respondent." It added, "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." (Emphasis ours.)

(2) The Clash With This Court's Rule 10.4

The fact is that Rule 3(c), even liberally applied, clashes with this Court's Rule 10.4 (App. F to Pet. for Cert., pp. 3-4). The latter provides for automatic inclusion as appellants before this Court of all parties to the proceedings appealed from unless written notice to the contrary is given. Under any view, it seems anomalous that two levels of the same judicial system should operate so differently as to such a vital matter.¹ Certainly, accentuation of the difference by application of Rule 3(c) as an invariable, jurisdictional requirement is at odds with the sound policy underlying this Court's Rules generally (and

¹ There may be an explanation not apparent to us, but the divergence of the two Rules seems especially hard to understand since both, as in the case of all rules applicable to the federal judiciary generally, have been promulgated by this Court pursuant to the statutory authority conferred in 18 U.S.C. sections 3771, et seq. and 28 U.S.C. sections 2071, et seq.

obviously valid as to all federal rules in view of the holding and comments in *Foman* discussed above). As Justice Black said years ago in ordering adoption of this Court's revised Rules, "The principle function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." (346 U.S. 945-46 (1954).)

(3) The Clash With Other Sound and Closely Analogous Decisions

The decisions with which the present opinion is at odds are hardly limited to those already cited. The occasions on which courts, often in the Ninth Circuit itself, have relaxed, or overridden procedural requirements in the interests of justices are many. The irregularities excused have included some which are surely not less important than non-specification of one of several identically situated appellants. Among them, for example, have been the incomplete or errant specification in the notice of appeal of the judgment or order appealed from and, for that matter, even the failure to file a true notice of appeal at all in time. In such cases, as in *Foman* and the other sound ones discussed above, considerations such as the actual intent of and hardship to the would-be appellant and the lack of prejudice to the opponent have been the pivot. (E.g., *Ward v. County of San Diego* (9th Cir. 1986) 791 F.2d 1329, 1331; *San Diego Comm. v. Governing Board* (9th Cir. 1986) 790 F.2d 1471, 1474; *Sierra On-Line, Inc. v. Phoenix Software, Inc.* (9th Cir. 1984) 739 F.2d 1415, 1421; *Haddad v. Lockheed Calif. Corp.* (9th Cir. 1983) 720 F.2d 1454, 1456; *United States v. One 1977 Mercedes Benz* (9th Cir. 1983) 708 F.2d 444, 451, [*cert. denied* (1984) 104 S.Ct. 981]; *Munoz v. Small Business Administration* (9th Cir. 1981)

644 F.2d 1361, 1364; *Kicklighter v. Nails by Jannee, Inc.* (5th Cir. 1980) 616 F.2d 734, 738-39, fn.1; *Vargas v. McNamara* (1st Cir. 1979) 608 F.2d 15, 21; *United States v. Walker* (9th Cir. 1979) 601 F.2d 1051, 1058.)²

To illustrate the degree to which the crabbed approach in the present opinion departs from salutary policy so frequently recognized and even in the same Circuit, we here quote some of the language in two of the opinions just cited although they should be read in their entirety for full appreciation:

The court in *San Diego Comm.* (790 F.2d at p. 1474) declared unequivocally that "we have discretion, where the interests of substantive justice require it, to disregard irregularities in the form or procedure for filing a notice of appeal."

In *Vargas*, it was said (608 F.2d at p.21), "It is contrary to the Federal Rules of Civil Procedure to defeat consideration on the merits because of such technicalities."

Some measure of, we regret to say, the superficial and unfortunate address to rule enforcement by the present

² This Court has indicated that procedural requirements, such as time limits for filing, are more readily susceptible to relaxation as non-jurisdictional if set forth in court rules rather than in statutes. (*Schacht v. U.S.* (1970) 398 U.S. 58, 64.)

It is noteworthy that *Foman* and other forebearers of the more recent cases cited in the text led to the successful proposal in 1979 for amendment of Rule 3(c) to add a sentence immediately after the language requiring specification of the matter appealed from. (See Notes of Advisory Committee on Appellate Rules, 1979 Amendment, Note to Subdivision (c), 28 U.S.C.A., Rules, Rule 3(c), West Publishing Co. (1980 ed.)) At least in spirit that sentence seems as significant to the requirement for specification of appellants. It reads, "An appeal shall not be dismissed for informality of form or title of the notice of appeal."

opinion and the other jurisdictional-view cases in the Ninth Circuit is found in the readiness of the present opinion (App. A to Pet. for Cert., pp. A4-A5) to rely on *Trinidad Corp. v. Maru* (9th Cir. 1986) 781 F.2d 1360. Although there is dictum in that case referring to Rule 3(c) in the strict sense, the actual holding favors appropriate relaxation of appellate rules. Counsel were there cautioned against the practices of filing "amended" notices of appeal instead of new ones where the original notice was filed before an unsuccessful motion in the district court to vacate or alter the judgment. It was stressed that Rule 4(a) requires an entirely new notice in such a situation. However, although wishing to give cautionary guidance for the future, the court was conscious of the hardship immediate and strict enforcement would work on the would-be appellants, who had followed the condemned practice. Accordingly, it refrained from applying Rule 4(a) "so strictly" as to throw them out of court and, instead, treated the "second amended notice" they filed as the "new notice" required by the Rule. (781 F.2d at p. 1362.)

C. The Present Opinion Is a Thoughtless Abdication of Inherent Power To Do Justice.

It merits emphasis that the hand-cuffing concept in the present opinion (App. A to Pet. for Cert., pp. A3-A5) is anomalous and seriously out of harmony in another important respect with settled doctrine which fortifies (and may at bottom explain) the imposing group of cases relaxing procedural rules. Giving lack of strict and timely compliance with Rule 3(c) such absolute and overriding importance as to preclude even jurisdiction to grant appellate relief amounts to a freakish abdication of the broad inherent power to do justice which all Courts of Ap-

peal have and should rightly have. Being inherent in character, the power, which encompasses if necessary recall of mandates already issued, is neither derived from nor limited by the federal rules of court procedure. (See, e.g., *A to Z Portion Meats, Inc. v. N.R.L.B.* (6th Cir. 1980) 643 F.2d 390, 392, fn.1; *Dilley v. Alexander* (D.C. Cir. 1980) 627 F.2d 407, 410-13; *Lamb v. Farmers Insurance Co.* (8th Cir. 1978) 586 F.2d 96, 97; *Ferrell v. Estelle* (5th Cir. 1978) 573 F.2d 867, 868; *American Iron & Steel Institute v. E.P.A.* (3rd Cir. 1977) 560 F.2d 589, 592-4 [*cert. denied* (1978) 435 U.S. 914].)

The virility and transcendent scope of the inherent power, so anomalously disregarded here, is demonstrated by the fact that, on occasions deemed fit, the Ninth Circuit has exercised that power to recall mandates for the purpose of correcting even substantive error. (*Verrilli v. City of Concord* (9th Cir. 1977) 557 F.2d 664, 665; *U.S. v. Kismetoglu* (9th Cir. 1973) 476 F.2d 269, 270 [*cert. dismissed* (1973) 410 U.S. 976].) Naturally, such exercise is more likely in the case of procedural concerns or the like. Indeed, "clerical mistake" and other "minor sins of omission or commission" have been described as providing "obvious" occasion for appellate correction through recall of the mandate. (16 Wright and Miller, *Federal Practice and Procedure* (1977) section 3938, Civil, p. 283.) Certainly, as we have seen, the court in Harrison when considering noncompliance with the procedural requirement of Rule 3(c) through clerical and harmless inadvertence did not hesitate to exercise its inherent power in furtherance of justice, including recall of its mandate.

D. The Present Opinion Ignores the Exceptional Circumstances Decisive in Torres' Favor Under the Proper Principles.

Duly considered, we submit, the exceptional circumstances involved here present a compelling case for relaxed application of Rule 3(c) and/or exercise of overriding inherent power in order to avoid a miscarriage of justice for Torres. Their crucial significance has been overlooked or misapprehended by the present opinion because of the unfortunate and short-circuiting approach it takes. We recall:³

(1) The "clerical error" acknowledged by the opinion (App. A to Pet. for Cert., p. A4) as causing omission of Torres' name from the notice of appeal resulted in no harm whatsoever to either the appellee or the reviewing court. The reasoning of the district court leading to the erroneous dismissal being appealed had not separated Torres in any way from the fifteen other co-plaintiffs in intervention named in the notice of appeal; it involved no individual variations among the plaintiffs but was addressed to basic overall considerations affecting alike plaintiffs as a group and, for that matter, absent members of the same class as well. It was the appellee who, by a footnote in its brief, called attention to

³ As we have seen, there is essentially no dispute as to the relevant facts as distinguished from their legal effect. Nor, of course, is there doubt under the familiar principles governing summary judgments that, whether in the first instance or on the *de novo* review required on appeal, the appellate court must take the record in the light most favorable to the party ruled against, including every reasonable inference and construction. tinguishable from the present one on their facts. However, we (E.g., *Adickes v. S. H. Kress & Co.* (1969) 398 U.S. 144, 157; *Continental Cas. Co. v. City of Richmond* (9th Cir. 1985) 763 F.2d 1076, 1078-79.)

the omission and its innocent cause, recognizing it to be the result of "oversight." Nothing occurred then or thereafter during the appeal to suggest that Torres was not to be treated as actually involved and interested in the appeal. The issues argued and resolved were not of varying individualized concern but were of general and the same concern to all the plaintiffs and absent class members.

(2) Another cogent circumstance is the representative potential of the intervention proceedings throughout, including the notice of appeal filed.⁴ From the inception, it was the intention of plaintiffs, duly reflected in the styling and the allegations of their complaint in intervention, to pursue relief from pervasive employment discrimination not merely as sixteen separate individuals but representatively as a group, each on behalf of all and on behalf of absent class members as well. In the notice of the appeal from the erroneous dismissal of the entire action on a basis of common and general concern, not only was the phrase "et al." used in the styling, but fifteen of the group were specifically named, that is, all but Torres, omitted through inadvertence. Surely, he is entitled in such circumstances to no less representative benefit with respect to the dismissal than entirely absent members of the class. The representative effect of conduct by active class members has, of course, been recognized for various

⁴ We argue later that two circumstances, namely, the harmlessness discussed in the preceding paragraph of the text and the representative effect of the original notice of appeal, are each, separately and alone, compelling reasons for reversal. However, the point now at hand is that those features together and the other exceptional ones to be recalled conjoin to remove any reasonable doubt as to the injustice worked by the present opinion.

purposes, and without regard to whether or not the class has yet been certified. (Cf. *Romasanta v. United Airlines, Inc.* (7th Cir. 1976) 537 F.2d 915, 918-19.)

(3) The unfortunate effort to throw Torres out of court seems clearly to the product of nothing but disgruntled afterthought. On the prior appeal itself, nothing was said or done to make or presage any claim that he was not person with an ongoing interest in the matter. To the contrary, after relegating the admitted "oversight" to a footnote in its brief, the appellee otherwise dealt with the generalized issues without any pretense of concern or of a distinction between Torres and his co-plaintiffs. His counsel was led to believe that no importance was being or would be given to the omission. It was only after the adverse decision that the appellee began making threatening noises as to Torres. Nevertheless, in proceedings on the remand, it continued to treat him as an ongoing plaintiff in discovery and otherwise. Indeed, it even sought to exploit his continued involvement by use of his deposition to limit merits issues. All this makes it particularly unconscionable to resort now to the inadvertent and harmless omission to deny Torres his day in court on the merits.⁵

⁵ Curiously, although overlooking the appellee's unthreatening posture during the appeal, the present opinion (App. A to Pet. for Cert., p. A4) mentions in passing that Torres' counsel did nothing to "cure the error" at the time. Under the opinion's reasoning, of course, it was too late for any curative attempt since a new notice of appeal or amendment of the existing one would have been foreclosed by expiration of the time for taking appeals. The fact is that, lulled by appellee's demeanor as

(Continued on following page)

(4) The use of the omission to bar Torres from benefit of the reversal of the erroneous dismissal is also harsh and unfair because absent members of the class which he joined in seeking to represent (and which was certified by the district court after the summary judgment against him, J.A. 150-51) remain free to benefit from that reversal although, unlike him they had no intention of joining in the appeal and were not even named in the complaint in intervention, let alone the notice of appeal. In granting summary judgment against him, the district court's order now appealed from reserves judgment as to whether Torres can or cannot hereafter participate as a class member. (App. B to Pet. for Cert. p. B4.) He thus is not only foreclosed by the order from the standing enjoyed by those he intended to join with throughout, but is threatened with denial of relief even entirely absent class members can obtain.

(5) An additional consideration making Torres a particularly fit candidate for relief is that nothing of a final kind has yet occurred in the district court pursuant to the unqualified reversal on the earlier appeal of the erroneous dismissal. Even the liability phase of the underlying bifurcated action is still pending. Obviously, relief can be granted (including recall of the mandate, as in

(Continued from previous page)

indicated in the text, Torres' counsel decided that a corrective attempt was not necessary or wise on weighing the various circumstances involved, including the danger that attempted change would be regarded as a self confession of the need for change or might otherwise serve to give undue importance to a matter about which even the appellee expressed no concern. (J.A. 127-28.)

Harrison) without any realistic concern, perhaps conceivable in some circumstances, over the disruptive consequences of not treating judgments as final.

(6) Yet more, there is the overarching circumstance that the underlying action from which the present opinion ousts Torres for a procedural lapse is one for invidious discrimination in the vital field of employment, proscribed by wholesome Congressional enactments. In civil rights cases generally, our Circuits, including the Ninth, have been reluctant to countenance summary dispositions, particularly on the basis of procedural shortcomings. (See, e.g. *Thomas v. Younglove* (9th Cir. 1976) 545 F.2d 1171, 1172; 10A Wright & Miller, *Federal Practice and Procedure* (2d ed. 1983) Section 2732.2, pp. 340-62.) Even in the absence of statutory prohibition, this Court, according to its rather recent self-assessment, has "consistently repudiated" distinctions among citizens based on their ancestry as being "odious to a free people whose institutions are founded on the doctrine of equality." (*Regents of the University of California v. Bakke* (1978) 438 U.S. 265, 290-91.) In the employment field, as this Court recognized on first opportunity following enactment of Title VII, the prophylactic aim of Congress is a sweeping one, including the removal of all "artificial, arbitrary and unnecessary barriers" to equal employment opportunity based on race or other invidious classifications. (*Griggs v. Duke Power Company* (1971) 401 U.S. 424, 430-32.) It would indeed be ironic, as well as unconscionable, if one intending throughout to join in fighting against and seeking redress for such discrimination were to be turned away without chance of relief by reason of a judicially imposed barrier which, in these circumstances,

can only be characterized as "artificial, arbitrary and unnecessary" in light of the sound precedents and policy considerations in point.

Altogether, the exceptional circumstances involved make the result reached in the present opinion untenable and require a reversal.⁶

II. REVERSAL IS REQUIRED BY THE DOCTRINE OF HARMLESS ERROR WITHOUT MORE

A subsumed but, in a sense, broader ground by itself sufficient for reversal is that the present opinion in effect rejects the applicability of the doctrine of harmless error to appellate proceedings. That outcome is, we submit, in conflict with both sound policy and persuasive authority.

Although the doctrine of harmless error does not appear to find specific expression in the Federal Rules of Appellate Procedure, it is honored in Rule 61 of the Federal Rules of Civil Procedure, and in broad terms. (App. F to Pet. for Cert., p. F3.) This Court recently pointed out, "While in a narrow sense Rule 61 applies only to the district courts, see Fed. Rules Civ. Proc. 1, it is well

⁶ We think most, if not all, the jurisdictional-view cases concerning specification of appellants are at least arguably distinguishable from the present one on their facts. However, we will not burden the Court or ourselves with canvassing of their details in the hope of showing that the omissions there, unlike here, may not have been inadvertent and harmless, did not occur in the setting of a class action, etc. They in all events contain broad language of the erroneous kind found in the present opinion and cannot be realistically, in the last analysis, be either completely nullified in mistaken impact nor spared criticism because of it on the basis of factual variations.

settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61. [citations] Congress has further reinforced the application of Rule 61 by enacting the harmless error statute, 28 U.S.C. § 2111, which applies directly to appellate courts and which incorporates the same principle as that found in Rule 61." (*McDonough Power Equipment, Inc. v. Greenwood* (1983) 464 U.S. 548, 554; see also *Kotteakos v. U.S.* (1946) 66 S.Ct. 1239, 1241, et seq.; 2 Wright, Miller and Elliott, *Federal Practice and Procedure*, Civil, §§ 2882 and 2884, pp. 273-74, 280-81.)⁷

It thus seems beyond doubt that the doctrine in question requires district courts to disregard harmless errors occurring on proceedings at that level and reweighing courts to do the same as to those errors. Although the precedents may be something less than crystal clear on the subject, there is no sound reason why the doctrine should not also apply the rest of the judicial way, that is, to harmless error in the course of the appellate proceedings, including the notices of appeal. Indeed, that reach of the doctrine seems inescapable given this Court's injunction in *McDonough* that Rule 61 embodies a "salutary policy" to be followed by appellate courts. Understandably, scholars in the field agree that the doctrine should so operate. (See, e.g., 9 Moore and Lucas, *Moore's Federal Practice* (2d ed. 1970) § 203.17, pp. 3-70.)

Actually, of course, the cases we have cited which relax or override appellate rules go far toward establishing

⁷ 28 U.S.C. § 2111 provides: "On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

applicability of the doctrine to harmless omissions in the course of appeals, although not in so many words and not perhaps, in the main, by giving the lack of harm the sole and pristine decisiveness conducive to bright-line precedent. To our minds, however, there seems to be no other sensible reading possible as to some of those decisions, including this Court's in *Foman* (371 U.S. at pp. 181-82). Nor is that assessment some wishful frolic of our own. In *Brookens v. White* (D.C. Cir. 1986) 795 F.2d 178, 180, it was said in reference to *Foman*, "The Supreme Court has emphasized that harmless error in the notice of appeal is insufficient to justify dismissal."

All else aside, the failure to add Torres' name to the list of his fifteen co-plaintiffs in the notice of the earlier appeal was and remains entirely harmless. Accordingly, that fact alone requires reversal of the present opinion, if as we think clear, the doctrine of harmless error governs proceedings on appeal as well as those in district court.

III. REVERSAL IS REQUIRED WITHOUT MORE BY THE REPRESENTATIVE EFFECT OF THE NOTICE OF APPEAL FILED

We also urge reversal on a ground which may be the most obvious of all, namely, that the notice of the successful appeal from the erroneous dismissal of the potential class action was in all events representative in character and served to protect the interests of Torres as well as those of absent class members. By necessary implication, the present opinion rejects the point and should be reversed for that reason alone.

We have not found decisional authority squarely in point. We respectfully submit it as obvious, however, that,

where a potential class action is involved and there is a ruling fatal to it, any class member who appeals represents the other members, whether or not they are specifically named as appellants in the notice of appeal. Also clear, we submit, is that there is no sound basis for not extending such representative protection to unspecified members theretofore active in the litigation as well as to the absent members. Nor can it be sound law that such representative effect of an appeal requires prior class action certification. Were that the law, no pre-certification ruling, however erroneous and fatal to the action, including denial of certification itself, could ever be appealed in a manner protecting the potential class.

Our position is supported by cases involving closely analogous situations. For example, in *Romansanta v. United Airlines, Inc.* (7th Cir., 1976) 537 F.2d 915, 918-19, it was held that, where one complying with administrative prerequisites for bringing a class action decides not to appeal when class certification is denied, a member of the potential class not personally satisfying the administrative requirements may nevertheless intervene to appeal the denial, relying on the representative effect of the administrative compliance by the original plaintiff. That decision was approved in the relevant respect in *United Airlines, Inc. v. McDonald* (1977) 432 U.S. 385, 389, fn.6; In accord see *Coopers & Lybrand v. Livesay*, (1978) 437 U.S. 463, 468; *Lane v. Bethlehem Steel Corp.* (D.C. Md. 1982) 93 FRD 611, 618; *U.S. v. Amer. Tel. & Tel. Co.* (D.C. Cir. 1980) 642 F.2d 1289, 1293-94.)

It merits stress that the case for representative effect here is a particularly strong one since the only reason the

one to be represented was not himself specified as an appellant was clerical and harmless error.

IV. THE FORM OF RELIEF NOW TO BE GRANTED TORRES SHOULD CONSIST OF REVERSAL WITH DIRECTIONS TO REMAND, ALTHOUGH A MORE ELABORATE ALTERNATIVE IS ALSO APPROPRIATE

As far as concerns the relief now to be granted Torres, we think it best, without further fuss and bother, for this Court simply to reverse and remand with directions to the Court of Appeals to reverse the summary judgment against Torres and remand the matter to the district court for his full reinstatement as one of the plaintiffs in intervention. Additionally, however, should this Court deem that procedure preferable before the remand to the district court, we see no sound reason why the Court of Appeals could not also be directed to recall the mandate issued in the earlier appeal and order amendment of the notice of that appeal to include his name in the list of specified appellants.

CONCLUSION

For the reasons stated above, we request that the judgment of the Court of Appeals be reversed and that the case be remanded to it with directions to reverse the summary judgment against Torres and remand to the district court for his full reinstatement as one of the plaintiffs in intervention.

Dated this 27th day of November, 1987.

Respectfully submitted,

B.V. YTURBIDE**

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RESPONDENT'S

BRIEF

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Supreme Court, U.S.

FILED

DEC 30 1987

JOSEPH P. SPANIOL, JR.
CLERK

No. 86-1845

In The
Supreme Court of the United States
October Term, 1987

JOSE TORRES,

Petitioner,

vs.

OAKLAND SCAVENGER COMPANY, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN, AND HELPERS OF
AMERICA, LOCAL NO. 70,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Respondent OAKLAND SCAVENGER COMPANY respectfully disagrees with petitioner's questions presented for review and submits that the following are correctly the questions before the Supreme Court:

Whether it was reversible error for the district court to enter summary judgment against JOSE TORRES, one of sixteen intervening plaintiffs in the underlying action, because his counsel failed to include his name in a notice of appeal from a judgment of dismissal entered against all plaintiffs on August 31, 1981, which judgment was subsequently reversed on appeal, and when, despite knowledge of the omission, he did not seek relief in the court of appeals from the failure to do so until after summary judgment was entered against him on September 17, 1985?

Whether filing the petition for writ of certiorari on May 13, 1987, was untimely with respect to the court of appeals' denial on April 14, 1986, of petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief, depriving this court of jurisdiction to review that action?

Whether the court of appeals abused its discretion by denying petitioner's motion for recall of the mandate and amendment of the notice of appeal after the district court entered summary judgment against petitioner for failing to file a notice of appeal from the judgment of dismissal entered August 31, 1981?

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No. 86-1845

—o—
In The
Supreme Court of the United States

October Term, 1987
—o—

JOSE TORRES,

Petitioner,

vs.

OAKLAND SCAVENGER COMPANY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL NO. 70,

Respondents.

—o—
**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**
—o—

BRIEF FOR RESPONDENT
—o—

Respondent OAKLAND SCAVENGER COMPANY respectfully requests that this court affirm the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 11, 1986, the ensuing judgment of the court of appeals entered on February 26, 1987, and the order denying petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief issued April 14, 1986.

—o—
JURISDICTION

Respondent respectfully disagrees with petitioner's assertion of jurisdiction with respect to the court of ap-

peal's denial of petitioner's motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief. The Ninth Circuit Court of Appeals denied that motion on April 14, 1986, and the petition for writ of certiorari was not filed until May 13, 1987, more than ninety days following the filing of that order. Consequently, this court does not have jurisdiction to review that decision.

PROVISIONS OF LAW INVOLVED

This case involves Rule 3(c), Rule 4(a)(1), and Rule 4(a)(5) of the Federal Rules of Appellate Procedure, and 28 U.S.C.S. § 2107, the pertinent provisions of which are set forth in Appendix A i.

STATEMENT OF THE CASE

JOSE TORRES was granted leave to intervene as a plaintiff in the case of *Martinez v. Oakland Scavenger Company* on October 24, 1980. That action arose upon a complaint of discrimination in employment on account of race and national origin under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* The district court granted defendants' motion under Rule 12(b)(6), F. Rules Civ. Proc., to dismiss the action on August 31, 1981. The amended complaint contained class allegations under Rule 23, F. Rules Civ. Proc., but a class had not been certified when the action was dismissed.

A notice of appeal was filed on September 29, 1981, in which the individual plaintiffs taking the appeal were specified. (J.A. 130.) JOSE TORRES was not named in the caption or in the body of the appeal. TORRES also was not listed in the required certification under Ninth Circuit Rule 13(b)(3) as to parties having an interest in

the outcome of the appeal. This rule provides that: "To enable the judges of the Court to evaluate possible disqualification or recusal, counsel for all private (non-government) parties shall in all cases other than criminal and habeas corpus cases attach to the inside front cover of such parties' initial brief, a certified list of all persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the case." (United States Court of Appeals, Ninth Circuit, Rule 13(b)(3).)

Respondent OAKLAND SCAVENGER COMPANY brought the omission to plaintiff's and the court's attention in footnote 3 of its opening brief filed in February 1982, stating, "Notice of Appeal has not been filed on behalf of the sixteenth person, Jose Torres, whose name, apparently by oversight, never appeared in the caption. He is not listed by appellants as a person interested in the outcome." (J.A. 132.) Counsel for TORRES had not made a timely motion in the district court under Rule 4(a)(5), F. Rules App. Proc., which permits late filing of a notice of appeal due to a showing of "excusable neglect or good cause," and, despite knowledge of the omission of TORRES' name, counsel did not seek leave to amend the notice of appeal from the court of appeals.

This failure to bring a motion to correct the notice of appeal was deliberate. Petitioner states in his brief that, "it was Yturbide's judgment that no affirmative steps on his part in the court of appeals to assure the continuing viability of the appeal as to Torres was necessary or wise in the circumstances." (Brief for Petitioners, page 8.) Additionally, TORRES' counsel waited for more than three years after the appellate court's deci-

sion before seeking a recall of the mandate in order to amend the notice of appeal to include TORRES.

The court of appeals reversed the original judgment of dismissal on November 9, 1982, and later remanded. A subsequent petition for writ of certiorari was denied by this court. On remand, respondent filed a motion for summary judgment dismissing the action as to JOSE TORRES on the ground that the prior judgment of dismissal was final as to him by virtue of his failure to appeal. The district court granted the motion on September 17, 1985, and entered judgment against TORRES. TORRES then appealed, and subsequently, on March 26, 1986, filed a motion for recall of mandate, amendment of notice of appeal, and/or other appropriate relief. The court of appeals denied the motion on April 14, 1986, and affirmed the district court's summary judgment against TORRES in an opinion entered on December 11, 1986. TORRES' petition for rehearing and suggestion for rehearing *en banc* were denied in an order filed February 13, 1987, and the court of appeals entered its judgment on February 26, 1987. TORRES then petitioned for a writ of certiorari, which this court granted on October 16, 1987.

The underlying action was tried as to liability from November 1986 through March 1987. Decision is pending.

REASONS FOR AFFIRMING THE JUDGMENT

The district court dismissed petitioner JOSE TORRES as a plaintiff in the underlying action because he failed to file a notice of appeal from a judgment of dismissal. Timely filing of a notice of appeal is jurisdictional, and the failure to name the party or parties taking the appeal is a violation of Rule 3(c), F. Rules App. Proc. The

district court had no jurisdiction to amend the notice of appeal following remand, so summary judgment was compelled by petitioner's failure to obtain prior relief from the court of appeals, or to file a timely motion to amend the notice of appeal under Rule 4(a)(5), F. Rules App. Proc. The absence of petitioner's name from the notice of appeal cannot be claimed to be an oversight because petitioner's counsel made a calculated decision not to request leave to amend the notice even after the omission of petitioner's name was brought to his attention. Furthermore, this omission is not a harmless error which can be readily disregarded, because the rights of the respondent would be substantially affected by the need for a new trial if petitioner becomes a party to the proceedings at this late date. The court of appeals' denial of the motion to recall the mandate was reviewable on petition for writ of certiorari, so petitioner's failure to file a petition within 90 days following that denial makes the petition filed May 13, 1987, untimely as to that order. The district court has reserved ruling as to whether petitioner would be entitled to participate in class relief, if any, so that issue is not properly before the court. Nevertheless, petitioner would be barred by the doctrine of *res judicata* from participating in such relief.

ARGUMENT

A. THE STANDARD OF REVIEW ON SUMMARY JUDGMENT IS DE NOVO.

The district court granted summary judgment against TORRES because he failed to file a timely appeal as required by Rule 4(a)(1), F. Rules App. Proc. Prior to the granting of this summary judgment, petitioner did not file a motion to extend the time for filing the notice of appeal

based on Rule 4(a)(5), F. Rules App. Proc., which permits such extension "upon a showing of excusable neglect or good cause . . . upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)," nor did petitioner seek leave to amend the notice of appeal. If the district court had been faced with a motion either to extend the time for filing or to amend the notice of appeal, the appellate court would have reviewed a finding that the failure to include TORRES' name in the notice of appeal was the result of excusable neglect under a standard of clear abuse of discretion. *Gooch v. Skelly Oil Company*, 493 F.2d 366, 368 (10th Cir. 1974). See also, *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967), cert. denied, 390 U.S. 997, 20 L.Ed.2d 97, 88 S.Ct. 1202 (1968).

However, no issue of "excusable neglect" was before the district court because petitioner never moved for an extension of time to file the appeal nor to amend the notice of appeal in the district court. Consequently, the appeal from the grant of summary judgment against TORRES involves only the question whether he was a party on the appeal, and in reviewing a summary judgment motion, the Ninth Circuit correctly stated in this case that, "The standard of review is *de novo*." (Petition, p. A-3.)

B. THE PETITION FOR WRIT OF CERTIORARI WITH RESPECT TO DENIAL OF RECALL OF THE MANDATE WAS UNTIMELY, THE COURT LACKS JURISDICTION TO HEAR IT, AND THE STANDARD OF REVIEW IS CLEAR ABUSE OF DISCRETION.

Separately, and in addition to the appeal of the summary judgment against him, petitioner filed, on March

26, 1986, a motion in the court of appeals for recall of mandate, amendment of notice of appeal, and/or other appropriate relief relating to the earlier appeal, which motion was denied on April 14, 1986. The Supreme Court's jurisdiction to review orders and decisions of the federal courts of appeals on writ of certiorari is plenary. 28 U.S.C.S. § 1254(1). Since denial of the motion to recall the mandate was reviewable, and no action remained to be taken on the earlier appeal (judgment having been entered on February 17, 1983), petitioner should have filed his petition within ninety days of the denial, or not later than July 14, 1986. Rule 20.4, Rev. Rules U.S. Sup. Ct.; 28 U.S.C.S. § 2101(c).¹ Consequently, the petition filed May 13, 1987, was not timely with respect to that denial, and this court has said that the failure to file a timely petition deprives it of jurisdiction. *Department of Banking v. Pink*, 317 U.S. 264, 268, 87 L.Ed. 254, 63 S.Ct. 233 (1942), rehearing denied, 318 U.S. 802, 87 L.Ed. 1166, 63 S.Ct. 850 (1943).

If this court reviews that denial nonetheless, the standard of review would appear to be clear abuse of discretion. *Gooch v. Skelly Oil Company*, *supra*.

C. THE DISTRICT COURT CORRECTLY DISMISSED JOSE TORRES AS A PLAINTIFF BECAUSE HE FAILED TO FILE A NOTICE OF APPEAL FROM THE JUDGMENT OF DISMISSAL ENTERED ON AUGUST 31, 1981.

¹ 28 U.S.C.S. § 2101(e) provides that a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment. This section is not applicable here because the judgment had already been issued by the appellate court before the petition was filed.

Petitioner's counsel failed to specify JOSE TORRES as a party taking the prior appeal and then did nothing to cure it when the omission was called to his attention. Rule 3(c), F. Rules App. Proc., requires in part that "the notice of appeal shall specify the party or parties taking the appeal." This serves to inform the other parties as to who intends to appeal. Timely filing of the notice of appeal is jurisdictional, and the appeal cannot be amended to include additional parties after the time limit has expired. *Cook and Sons Equipment, Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960).

Where more than one party intends to appeal, each must be specified on the notice of appeal. The term "*et al.*" does not inform the other parties as to who is appealing and is therefore not appropriate. *Van Hoose v. Eidson*, 450 F.2d 746, 747 (6th Cir. 1971). In cases involving multi-party litigation, appellants must include and name individual plaintiffs who are appealing. *Samuel v. University of Pittsburgh*, 506 F.2d 355, 356 (3d Cir. 1974). The identity of the parties taking the appeal may be a crucial factor in the preparation and presentation of the opposing party's arguments. In addition, identifying all of the parties interested in the outcome of the appeal is required by the Ninth Circuit because it enables the judges of the court to evaluate possible disqualification or recusal. (United States Court of Appeals, Ninth Circuit, Rule 13(b)(3).)

There are various costs incurred in pursuing an appeal, especially where, as in the underlying action, attorneys' fees as well as costs may be awarded to the prevailing

party, and an unsuccessful appeal could be very burdensome to the individual appellants. See, 42 U.S.C. § 2000e-5(k). In requiring that each party be named in the notice of appeal, the court is assured that the named parties have committed themselves to the outcome, including accepting the burden of paying any awarded costs and attorneys' fees that may be applicable. This precludes a party from "sitting on the fence," awaiting the outcome and then deciding to participate only if it is favorable.

The omission in this case seems even more egregious, and thus the attempt to play it down more understandable, when the way in which it ostensibly occurred is considered. Petitioner's counsel asserts that he had advised his secretary that, in typing the notice of appeal, "the plaintiffs were to be specifically designated as appellants by copying their names as appearing in the Complaint in Intervention." (J.A. 125.) The caption of the Complaint in Intervention, however, had omitted TORRES' name. (J.A. 82.) The responsibility of counsel to secure the consent of the parties he represents before commencing an appeal demands that the list of appellants to be included in the notice of appeal should be determined from a separate checklist or written consents prepared by counsel after he confirms the desire of each plaintiff to participate, and not by the mere copying of names from the caption of the complaint. The propriety of using the caption instead of a checklist, particularly in litigation involving a large number of named plaintiffs, should be critically scrutinized in view of the risk that unwilling parties will be swept into an appeal, not with their express consent, but instead because counsel or other named parties wish to pursue it.

D. FAILURE TO NAME JOSE TORRES IN THE NOTICE OF APPEAL WAS NOT EXCUSABLE OVERSIGHT WHEN PLAINTIFF'S COUNSEL MADE A DELIBERATE DECISION NOT TO REQUEST CORRECTION OF THE NOTICE.

In his petition for a writ of certiorari, petitioner contended that the omission of JOSE TORRES from the notice of appeal was an oversight. Now, in his brief, he additionally contends that he "was led to believe that no importance was being or would be given to the omission," and that "on the prior appeal itself, nothing was said or done to make or presage any claim that [Torres] was not person with an ongoing interest in the matter." (Brief for Petitioners, page 24.) On the contrary, footnote 3 of OAKLAND SCAVENGER COMPANY's opening brief stated unequivocally that notice of appeal had not been filed on behalf of JOSE TORRES, and that he had not been listed as a person interested in the outcome, as required under Rule 13(b)(3) of the Ninth Circuit Court of Appeals. Contrary to any suggestion that TORRES' counsel was misled, petitioner's brief concedes, "Torres' counsel decided that a corrective attempt was not necessary or wise on weighing the various circumstances involved, including the danger that attempted change would be regarded as a self confession of the need for change or might otherwise serve to give undue importance to a matter about which even the appellee expressed no concern." (Brief for Petitioners, page 24, footnote 5.)

Petitioner's reply brief, dated March 18, 1982, made no mention whatsoever of TORRES' status as a party:

the reply brief did not address the issue of TORRES' exclusion from the appeal which was brought to the surface in respondent's brief, nor did it attempt to inform or advise respondent that TORRES was participating in the appeal. In failing to take any action at this point, it appears that TORRES' counsel was hoping to avoid confronting his error in the court.

OAKLAND SCAVENGER COMPANY *again* informed TORRES that he was not considered a party to the appeal in OAKLAND SCAVENGER COMPANY'S petition for a writ of certiorari: "Fifteen of the sixteen intervenors appealed. Notice of appeal was not filed on behalf of intervenor Jose Torres and he was not listed by respondents in their opening brief to the Ninth Circuit as a party interested in the outcome." (Petition for a Writ of Certiorari to the United States Court of Appeals, Ninth Circuit, October Term, 1982, Docket No. 82-1699, page 8; J.A. 106.) TORRES still made no indication that he was a party to, or interested in, the appeal. In the ensuing three years before the summary judgment which is the subject of this petition, TORRES' counsel did not move to cure the omission. TORRES' counsel did not seek relief even after OAKLAND SCAVENGER COMPANY advised the district court, "Defendant intends to make a motion for summary judgment to dismiss Jose Torres, one of the sixteen intervening plaintiffs, who did not file a notice of appeal." (J.A. 139.)

E. THE DISTRICT COURT AND THE COURT OF APPEALS WERE WITHOUT AUTHORITY TO REINSTATE PETITIONER AS A PARTY TO THIS ACTION.

There is no statutory or decisional authority allowing a district court to amend a notice of appeal to add parties following entry of judgment by the appellate court. Rule 4(a)(5) permits the district court, "upon a showing of excusable neglect or good cause," to extend the time for filing the notice of appeal, upon motion filed not later than thirty days after the date of the judgment from which the original appeal was taken, but the rule cannot support a motion for amendment of the notice after the action is concluded. In *Harrison v. United States*, 715 F.2d 1311 (8th Cir. 1983), the court of appeals said that a district court lacks jurisdiction to amend a notice of appeal to include an omitted party's name after the appellate court had remanded the case. Similarly, the district court in the current action noted at the hearing on the motion for summary judgment that it did not "have the power to correct" the notice, and summary judgment must be entered because the correction of the error was not within the "inherent power" of the court. (J.A. 145.)

The court of appeals also did not have authority to amend the notice of appeal to add TORRES as a party on the appeal following the subsequent entry of summary judgment against him. In *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365 (9th Cir. 1985), the district court had entered summary judgment against the plaintiffs, who appealed, but only one plaintiff's name was listed on the notice of appeal. The United States Court

of Appeals, Ninth Circuit stated that the court did "not have jurisdiction to consider (the omitted party) Farley Terminal's claim because it failed to file a rule 3(c) notice of appeal." *Id.* at 1370. The court in *Farley* dismissed the appeal, citing Rules 3(a) and 4(a), F. Rules App. Proc., under which the filing of a notice of appeal within the thirty-day period specified by rule 4(a)(5) is "mandatory and jurisdictional." *Id.* at 1368.

Some circuits have allowed the notice of appeal to be amended to include the omitted party when no prejudice would befall the opposing party, but none have done so after the party was subsequently dismissed on summary judgment. It was not a clear abuse of discretion on the part of the Ninth Circuit to deny such relief in this action. Furthermore, the courts of appeals have allowed amendment of notices of appeals only in "rare" circumstances. *Harrison v. United States*, *supra*, 715 F.2d 1311.

Petitioner cites *Harrison v. United States* and would have the court apply such an exception in this case. In *Harrison*, a party was not named in the notice of appeal, and after remand the court clerk informed the party of the error and the party filed a motion to reopen the case and amend the notice of appeal. The omission of the party was due to clerical error, and none of the parties knew of the mistake or used it to their advantage. Finding no prejudice to either party by the mistaken omission, the appellate court recalled the mandate and allowed amendment of the notice of appeal. The instant case is distinguishable because here both parties were aware of the omission of JOSE TORRES' name from the notice of appeal and defendant OAKLAND SCAVENGER COMPANY had indi-

cated in its brief on appeal that it did not consider TORRES a party to the appeal.

In another unusual case, *Williams v. Frey*, 551 F.2d 932 (3d Cir. 1977), the court allowed the notice of appeal to be amended in the court of appeals because appellees had considered the omitted parties to be participating at all stages of the appeal and because the court found no harm or prejudice to the opposing parties by amending the notice. The present case can be distinguished again because respondent made it clear in its brief that JOSE TORRES was not considered to be an appellant, and because prejudice to respondent would be substantial with the case already having been tried.

More importantly, in none of these actions did an appellate court recall its mandate or amend a notice of appeal to include unnamed parties *after* summary judgment had been granted against those parties because of their failure to be named in the appeal. In the present case, not only has summary judgment been granted against TORRES, but the trial of the underlying action has already been completed without Torres' participation.

The petitioner cites this court's opinion in *Foman v. Davis*, 371 U.S. 178 (1962), as eschewing the "strict view" of interpreting the Federal Rules of Civil Procedure. While agreeing with this court's statement in *Foman* that it is "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities," *id.* at 181, the Ninth Circuit has put that into perspective and said:

This does not mean that failure to comply with the rules is of no consequence merely because [the fail-

ure] does not mislead or prejudice the other party. Adopting a purely "equitable" approach to applying the rules would result in unpredictability and defeat the purpose of the rules, which is to promote the orderly resolution of disputes and to discourage dilatory practices. . . . A literal interpretation of rule 3(c) creates a bright-line distinction and avoids the need to determine which parties are actually before the court long after the notice of appeal has been filed.

Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1369 (9th Cir. 1985). Additionally, contrary to petitioner's belief, the Ninth Circuit in *Farley* saw no conflict between Rule 3(c) of the Federal Rules of Appellate Procedure and Rule 10.4 of the Rules of the Supreme Court. It is only when the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals are silent as to a particular matter of appellate practice that the relevant rule of the Supreme Court is applied. Since Rule 3(c) of the Federal Rules of Appellate Procedure specifies that the parties taking the appeal must be listed on the notice, the Supreme Court's Rule 10.4 does not apply here. *Id.* at 1369-1370.

In *Foman*, the petitioner filed a notice of appeal from a judgment of the district court, and within ten days filed a separate second notice of appeal from a denial of a motion in that same court. The court of appeals found that the first notice of appeal was premature in view of a pending motion to vacate the judgment, and thus of no effect. It then found that the second notice of appeal was ineffective to review the judgment because the notice failed to specify that the appeal was being taken from that judgment as well as from the orders denying the motions. This court held that the court of appeals was in er-

ror in reading the second notice. Having both notices of appeal before it, the court of appeals "should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Id.* at 181. The court acknowledged that not only was petitioner's intention to seek review of both the judgment and the denial of the motions manifest, but also that both parties briefed and argued the merits of the earlier judgment on appeal, indicating that both parties perceived the second appeal to include the judgment as well as the denial of motions.

In the present case, however, petitioner knew that respondent did not consider TORRES as a party to the appeal. In addition, the present case is concerned with the parties to an appeal, and as such deals directly with a unique jurisdictional question; *Foman*, on the other hand, was concerned with the judgment or order appealed from, and did not address the jurisdictional issue associated with the specification of parties. *Foman* is thus not on point here.

Trinidad Corp. v. Maru, 781 F.2d 1360 (9th Cir. 1986), cited by petitioner, is similar to *Foman*. In *Trinidad*, the appellant filed a notice of appeal while a timely motion to vacate the district court judgment was pending. After the motion to vacate was denied and the district court judgment was final, appellant filed a second amended notice of appeal. The court noted that the first notice of appeal was filed prematurely, and thus was of no effect, and that the second amended notice of appeal was also technically void: "Similarly, a notice of appeal that is void at the outset cannot by amendment become anything

other than void." *Id.* at 1362. However, the court decided that since the second amended notice had been filed after the final judgment, and was therefore timely if viewed as an original notice of appeal, the court would consider the second amended notice as a "mis-styled" form of a notice of appeal.

In *Trinidad*, the appellants had tried to correct their error by amending the notice, and the court of appeals recognized this in transforming the second amended notice, as written, into the required notice of appeal. However, the court strongly cautioned counsel to avoid this practice in the future, and maintained that the "effect of a notice of appeal is determined at the time it is filed. The notice cannot be amended to add additional parties as appellants after the time for appeal has expired." *Id.* at 1362.

Petitioner cites without discussion several other cases in which "exceptional circumstances" have led to inclusion of an unnamed party in an appeal. (Brief for Petitioners, page 15.) Those cases, which relaxed compliance with Rule 3(c) for specific reasons, are either in direct conflict with the Ninth Circuit's rule or distinguishable. For example, in one cited case the notice of appeal included the personal name of a party to the action who had died over one year before the appeal was taken, and the court allowed substitution of the estate of the deceased as a party to the appeal. See, *Brubaker v. Board of Education*, 502 F.2d 973, 983 (7th Cir. 1974). The opinion in the cited case of *Parrish v. Board of Com'rs of Alabama State Bar*, 505 F.2d 12 (5th Cir. 1974) has been withdrawn, 509 F.2d 540 (5th Cir. 1975), and a subsequent opinion in the same circuit, *Smith & Associates v. Otis Elevator Co.*, 608 F.2d 126, 127 (5th Cir. 1979), dismissed the appeal as to a party that had not been named in the notice of appeal. In an-

other cited fifth circuit case, the court included in the appeal a party that had not been named in the notice of appeal when the court perceived "no basis for surprise, detrimental reliance, or prejudice to appellees because of the use of 'et al.' in the notice of appeal." *Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1177 (5th Cir. 1986). However, if the failure to name a party in the notice of appeal does in fact deprive the court of appeals of jurisdiction over that party, then those cases permitting amendment must be considered incorrectly decided.

In addition, petitioner cites several cases where the courts have "overridden procedural requirements in the interests of justice" where "considerations such as the actual intent of and hardship to the would-be appellant and the lack of prejudice to the opponent have been the pivot." (Brief for Petitioners, page 18.) None of these cases is on point here, as none deals directly with the specification of parties to an appeal.

Petitioner supposes that "the exceptional circumstances involved here present a compelling case for relaxed application of Rule 3(c) and/or exercise of overriding inherent power in order to avoid a miscarriage of justice for Torres." (Brief for Petitioner, page 22.) In the untimely but vigorous pursuit of the remedies of reversal and/or recall of mandate, petitioner's counsel does not mention the existence of yet another remedy available in the courts of the State of California that would be significantly less prejudicial to the respondent.²

² In a case such as this, where a prejudicial error has been committed by the client's counsel and that counsel has used his own judgment in not attempting to correct the error, the client may have redress from his counsel under California law. See, California Code of Civil Procedure § 340.6.

F. THE OMISSION OF TORRES' NAME FROM THE NOTICE OF APPEAL DOES NOT CONSTITUTE HARMLESS ERROR, AND THE DOCTRINE OF HARMLESS ERROR DOES NOT APPLY TO THE FAILURE TO NAME PARTIES IN A NOTICE OF APPEAL.

Petitioner discusses the doctrine of harmless error, and asserts that there is no sound reason why the doctrine should not apply to appellate proceedings. (Brief for Petitioners, pages 27-28.) Petitioner then cites several cases, and also cites the harmless error statute embodied in 28 U.S.C. § 2111, for the proposition that the harmless error doctrine should thus apply in favor of TORRES in this appellate proceeding. Petitioner would invoke the doctrine in this case by claiming that the omission of TORRES' name from the notice of appeal was mere harmless error, and ask the courts to disregard the omission and add TORRES' name to the names of the parties taking the appeal. Normally, the harmless error doctrine is invoked with respect to an error by the court. See, e.g., *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 78 L.Ed.2d 663, 104 S.Ct. 845 (1984); *Kotteakos v. United States*, 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946). In addition, it has been held that the doctrine of harmless error does not apply where a name has been omitted from a notice of appeal. "Only the parties named in the notice of appeal are brought within the appellate court's jurisdiction... The harmless error doctrine has no application to failure to name parties in a notice of appeal." *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, *supra*, 778 F.2d 1365, at 1368-1369, citing *Cook and Sons Equipment, Inc. v. Killen*, 277 F.2d 607 (9th Cir. 1960), at 609. Only infrequently has the doctrine been invoked in situations

involving errors in the notice of appeal, and in those cases the issues have involved the designation of the judgment or order appealed from, rather than the specification of parties which is the issue in the instant case. Clearly, petitioner is misapplying the doctrine of harmless error here in an attempt to relieve himself from an error made, not by the judiciary but by petitioner in his notice of appeal, which error his counsel chose not to attempt to correct in a timely manner.

Even if the harmless error doctrine could be invoked in situations similar to the instant case, it applies only when disregarding the error "does not affect the substantial rights of the parties." Fed. Rules Civ. Proc. No. 61. Here, the relief sought by petitioner, including a recall of the appellate court mandate and/or amendment of the notice of appeal to include petitioner's name in the appeal, is not reasonable or practical and would be unduly prejudicial to respondent. The underlying action has already been tried, spanning over twenty-five trial days from November 1986 to March 1987 and encompassing testimony from at least 40 witnesses. If TORRES were now added to the list of plaintiffs, the entire case would have to be retried, or a separate trial held with regard to his individual claims, which involves the possibility of much redundant testimony and argument.

G. WHETHER PETITIONER IS BARRED BY THE DOCTRINE OF RES JUDICATA FROM PARTICIPATING IN CLASS RELIEF IS NOT BEFORE THE COURT, THOUGH THE SUMMARY JUDGMENT GRANTED AGAINST PETITIONER BARS HIM FROM RECOVERY AS AN INDIVIDUAL OR AS A CLASS MEMBER.

The issue of whether or not JOSE TORRES may participate as a class member in the underlying case is not properly before this court, as the district court specifically reserved that issue, to "be decided only after the parties have an opportunity to brief the matter and argue it before the court." (J.A. 147.) However, it appears axiomatic that after summary judgment has been granted against TORRES, the doctrine of *res judicata* bars him from recovery in this suit as an individual and as a class member.

Summary judgment against JOSE TORRES was granted the second time on September 17, 1985. Class certification in this case was not granted until February 18, 1986. (J.A. 150.) The subsequent class certification cannot relieve appellant from the bar of the prior judgment.

The doctrine of *res judicata* makes a judgment, once rendered, the full measure of relief to be accorded between the same parties on the same claim or cause of action. 18 Wright and Miller, *Federal Practice and Procedure*, § 4402, page 7 (2d ed. 1983). JOSE TORRES is barred by the judgment against him from any recovery in the underlying action. TORRES' claim for relief is the same claim raised by the other plaintiffs in this case. Class action preclusion is subject to all the requirements that apply to issue and claim preclusion in individual actions. *Id.* at § 4455, page 473.

The decision in the district court for summary judgment was valid, it was final, and it was on the merits. Judgments entered through summary judgments "clearly constitute dispositions on the merits" (Wright, § 4428, page 271), and put an end to the cause of action. A judgment on the merits is an absolute bar to subsequent action between the same parties. *White v. Colgan Elec. Co., Inc.*, 781 F.2d 1214 (6th Cir. 1986). Consequently, JOSE TORRES cannot participate as a class member in the ongoing action against OAKLAND SCAVENGER COMPANY.

CONCLUSION

The district court was required to grant the motion for summary judgment against JOSE TORRES. The failure to correct the notice of appeal was not an oversight, by counsel's admission, so there is no basis for relief under Rule 4(a)(5), F. Rules App. Proc. Petitioner's counsel deliberately chose not to seek leave to amend the notice of appeal from the time he learned of the omission in 1982 until after summary judgment had been rendered a second time. The district court lacked authority to amend the notice of appeal, and the court of appeals did not abuse its discretion in denying the motion to recall the mandate. According to the doctrine of *res judicata*, JOSE TORRES is now barred from further relief in this case, as a named party or class member.

For these reasons, OAKLAND SCAVENGER COMPANY respectfully requests the court to affirm the appellate court judgment. However, if this court decides that some remedy is justified which will continue TORRES'

claims against OAKLAND SCAVENGER COMPANY, then OAKLAND SCAVENGER COMPANY urges that the only efficient remedy is to order a new and separate trial for TORRES alone.

DATED: December 30, 1987.

Respectfully submitted,

HARDIN, COOK, LOTER, ENGEL
& BERGER

BY: /s/ STEPHEN MCKAR

*Counsel of Record on Behalf
of Respondent
Oakland Scavenger Co.*

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APPENDIX

Rule 10.4 of the Revised Rules of the Supreme Court of the United States provides, in pertinent part:

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal.

Rule 3(c) of the Federal Rules of Appellate Procedure provides, in pertinent part:

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part:

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure provides:

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the pre-

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scribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 61 of the Federal Rules of Civil Procedure provides:

Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

28 U.S.C. § 2107, Judiciary and Judicial Procedure, provides in pertinent part:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

REPLY BRIEF

No. 86-1845

Supreme Court, U.S.
F I L E D

JAN 29 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

JOSE TORRES,

Petitioner,

vs.

OAKLAND SCAVENGER COMPANY,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
and HELPERS OF AMERICA, LOCAL NO. 70,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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SUMMARY OF ARGUMENT

Just as a horse does not cease being a horse because someone calls it a cow, questions occasioning this Court's grant of a certiorari petition do not magically evaporate because a respondent later proclaims their absence and attempts to supplant them with incidental and even manufactured issues deemed more comfortable to come to grips with.

The infirmity of such an unfortunate approach is again demonstrated, we submit, by the brief respondent company has filed. The truly decisive considerations are essentially left without meaningful address, let alone effective refutation of what we have argued. Served up instead, with the apparent aim of blur and burial, is a pudding whose unpalatability should not require much eating to prove. Illustrative of the unwholesome ingredients are the following:

(1) There is complete silence as to several important points, including one in and of itself decisive in all events, namely, the entitlement of Jose Torres to share in the benefits of the earlier successful appeal because of the representative effect of the notice of that appeal filed by fifteen of his specifically named co-plaintiffs.

(2) A number of assertions concerning the factual posture of the case are entirely inapposite and even affirmatively misleading. They include, but are hardly limited to, the absurd pretense that this Court is foreclosed from applying the doctrine of harmless error here or otherwise holding in Torres' favor because a new and separate liability trial in addition to the classwide one already had would then be necessary as to him.

(3) A remarkable effort is made to challenge this Court's jurisdiction and misrepresent which holding and judgment of the Court of Appeals we seek to cure.

(4) Baldly invoked anew even now, without bothering to analyze their soundness and as if somehow self-proving and controlling at this level, are the Ninth Circuit and other pronouncements adopting the strict jurisdiction-

al view of Rule 3(c) of the Federal Rules of Appellate Procedure. They are, of course, among the very matters now before this Court for review in light of their clash with the authorities which we have cited as the ones worthy of allegiance but which are largely ignored by respondent and, indeed, go unmentioned at all except in superficial and specious terms unmindful of the important policy conflict at hand.

(5) In belittlement of the inadvertence basically involved and of the concern that Torres not be left remediless for employment discrimination because of clerical and harmless omission, respondent makes the reckless and callous suggestion that Torres has and should pursue a remedy available to him in the form of a suit against his attorney. Counsel is pilloried for deliberate folly in not taking corrective steps which not only were for good reason believed by him to be uncalled for and unwise, but would have been an exercise in futility in light of the rigid thesis still espoused by respondent and adopted by the Court of Appeals.

(6) Yet more, there are the gymnastics by which, in the same rather incredible breath, it is said that a question is not before this Court because the summary judgment expressly reserved decision on it but that the question is nonetheless res judicata notwithstanding that reservation and notwithstanding that the validity of the summary judgment for any purpose is at issue.

(7) And permeating all is the readiness of respondent at every opportunity to mince and avoid by resort to facile and unsearching maneuver and stark procedural ritual without regard to substantive justice and the underlying dictates of sound policy and fairness.

ARGUMENT

We intend no preliminary revisitation of the record to expose as a group the various factual fallacies and misimpressions set forth by respondent, not infrequently by bare assertion without citation to the record. The more

important inaccuracies will be duly noted in the parts of our argument to which they respectively relate. For a fair overall summary of what the record truly contains short of the recent outcome, favorable to persons in Torres' position, of the liability trial in the underlying action (to be discussed more fully later), we solicit the Court's renewed attention to the "STATEMENT OF THE CASE" in our opening brief (pp. 2-11).

I. RESPONDENT FAILS TO REFUTE OR EVEN ATTEMPT TO REFUTE THAT REVERSAL IS REQUIRED WITHOUT MORE BY THE REPRESENTATIVE EFFECT OF THE NOTICE OF THE EARLIER APPEAL.

On the basis of what seemed to us to be sound analysis and authority cogently in point, we argued in our first brief (pp. 29-31) that omission of 'Torres' name from the notice of the earlier appeal cannot bar him from sharing in the benefit of the success realized because his interests were in all events representatively protected by that notice, which specifically named the other active members of the same class on whose behalf the intervention had occurred from the start. As far as we can discern, not a word is vouchsafed by respondent on the entire subject. Apparently respondent, unable to uncover any reasoning or authority at variance with our position, has decided to pin its hopes in prayerful silence on the possibility that this Court, like the ones below, will somehow fail to focus on the matter enough to appreciate its significance here. However, the plain truth remains that the unaddressed point is not only a sound one, but is alone sufficient ground for reversal.

II. RESPONDENT FAILS TO REFUTE THAT REVERSAL IS REQUIRED WITHOUT MORE BY THE DOCTRINE OF HARMLESS ERROR.

Also clearly vulnerable to ready reply is the futile struggle in respondent's brief (pp. 19-20) to refute the demonstration in ours (pp. 27-29) that the doctrine of harmless error should apply here and is in and of itself decisive in Torres' favor. The following should suffice to

illustrate the fallacies, both legal and factual, riddling respondent's treatment:

(1) There is no merit in the suggestion that the doctrine in question should apply only as to judicial errors, not those arising from the conduct of parties or their counsel. For example, as enounced in Rule 61 of the Federal Rules of Civil Procedure (App. F to Pet. for Cert., p. 3), the doctrine expressly reaches "anything done or omitted by the court or by any of the parties." (Emphasis ours.) Moreover, of course, as discussed and cited in our earlier brief (see particularly pp. 15-17, 18-19, and 28-29), there are many cases (including this Court's decision in *Foman v. Davis, Executrix* (1962) 371 U.S. 178, 181-82) in which the doctrine has been effectually accorded a prominent, if not decisive, role in excusing a party's non-compliance with federal court rules and in regard to appellate proceedings.¹

(2) The cases we have cited also belie the assertion in respondent's brief (pp. 19-20) that "Only infrequently has the doctrine been invoked in situations involving errors in the notice of appeal, and in those cases the issues have involved the designation of the judgment or order appealed from, rather than the specification of parties which is the issue in the instant case." Non-specification of parties was the very matter at issue in *Ayres v. Sears, Roebuck & Co.* (5th Cir. 1986) 789 F.2d 1173, 1177, and *Harrison v. U.S.* (8th Cir. 1983) 715 F.2d 1311, 1312-13, and their several kindred discussed in our opening brief (p. 15). Those decisions, together with the others we cited (pp. 16-17 and 18-19) involving inept or absent notices of appeal with respect to the designation of the disposition appealed from (surely a concern at least rivaling the present one in importance), constitute a solid body of authority hardly war-

¹ Of course, there was here no actual "error," harmless or otherwise, in the legal sense of non-compliance with rules if, as we have urged, the representative effect of the notice of appeal filed by Torres' co-plaintiffs protected his interests. The omission of his name from the notice was an "error" only in the sense that inclusion of his name with the others was intended but did not occur through inadvertence.

ranting brush-aside expressions such as "infrequently." Numerosity aside, however, the question at hand should obviously not be resolved by merely counting decisional noses but on the basis of what is consonant with substantive justice and fairness.

(3) Amusingly enough, in prelude to the specious attempt to short-circuit the imposing group of cases to the contrary, respondent's brief (p. 19) treats the inapplicability of the doctrine here as established by a mighty phalanx of two Ninth Circuit decisions, *Farley Transp. Co. v. Santa Fe Trail Transp. Co.* (9th Cir. 1985) 778 F.2d 1365, 1368-69, and *Cook and Sons Equipment, Inc. v. Killen* (9th Cir. 1960) 277 F.2d 607, 609. With perfunctory quotation and citation, they are put forth as if self-provingly dispositive even now, without worry about their soundness or about whether such barebones pronouncements by a court of appeals are automatically entitled to deference at this higher level. In reality, of course, those decisions in their broad language are nothing but exemplars of the group (duly acknowledged in our opening brief, p. 14) adopting the rigid jurisdictional view of the appellant-specification provision in Rule 3(c) of the Federal Rules of Appellate Procedure. To be sure, under that view, lack of harm is immaterial. That, indeed, is among the view's multiple vices which we have raised for the Court's consideration in this proceeding and which call for allegiance to the opposed body of authority consistent with traditional principles geared to substantive justice, including the doctrine of harmless error.

(4) We regret to say that, in its desperate hunt for prejudice foreclosing application of the doctrine with respect to the omission of Torres' name from the notice of the earlier appeal, respondent's brief (p. 20) has resorted to pretextual nonsense.

At the threshold, it skews reality to pretend that the omission has been the guilty cause of the inconsequential circumstance that Torres was not formally before the court as a named plaintiff during the trial of the liability phase of the underlying action for employment discrimination.

Aside from its lack of importance to the trial (to be discussed in a moment), that exclusion of Torres was formalized solely because, almost three years after the erroneous dismissal of the action was reversed on the earlier appeal, respondent successfully moved the district court to enter the summary judgment dismissing Torres as a named plaintiff because he was not specifically named in the notice of the appeal. Until then, there had been no such ruling anywhere, certainly not in the opinion and mandate of the Court of Appeals, which appeared to nullify the erroneous dismissal in its entirety, without qualification or reservation as to Torres or anyone. (J.A. 133-34; see also report of opinion in 697 F.2d 1297 (1982).²

Nothing less than unadulterated poppycock in all events are respondent's assertions and intimations to the effect that, because Torres was not formally before the district court as a named plaintiff pending appeal from the summary judgment against him, the liability trial of the underlying action occurring in the interim misfired and was meaningless as to him so that his reinstatement as a named plaintiff at this stage will have the burdensome consequence of requiring new and separate liability proceedings as to him duplicatory of a trial lasting for months and involving voluminous evidence, including the testimony of some forty witnesses. Ample measure of the absurdity of that thesis is found in the fact alone that, had such a horror been even remotely in the offing in the minds of either side or the court, there would naturally have been at least some effort to stay the trial as it neared or (more suitably) to keep it open pending resolution of the present controversy but that nobody made any such effort.

The truth is that, as everyone recognized throughout, Torres' involvement as a sixteenth named plaintiff was not material in any way to proper trial of liability as that phase of the litigation would and did develop. He not only

² Although the unqualified opinion of the Court of Appeals was filed on November 9, 1982, respondent did not notice its motion to exclude Torres until July 29, 1985. (J.A. 95.)

remained a possible class member even after the summary judgment in view of the reservation of decision on that point (App. B to Pet. for Cert., p. 4), but could always be called by either side as a liability witness if desired. More important, particularly in light of the bifurcation, the existence or nonexistence of employment discrimination could be and was tried with focus on the class the court had defined rather than on whether any given individual, named plaintiff or not, could demonstrate a violation of the law as to him individually. Bifurcation made it especially appropriate for plaintiffs to proceed in the manner familiar in such litigation, namely, by relying basically on statistical and other general proof of class-wide import, including expert evidence, and using so-called "anecdotal" evidence of some individual experiences with the limited aim of bringing "the cold numbers convincingly to life." (See *Intl. Brotherhood of Teamsters v. U.S.* (1976) 431 U.S. 324, 338-39.) The anecdotal witnesses did not include Torres, but that had nothing to do with his ouster as a named plaintiff. The great majority of the named plaintiffs were not deemed necessary to call for the limited purpose involved, and the anecdotal witnesses did include several class members who were not named plaintiffs.

Naturally enough, the posture of the defense at the trial was of a corresponding kind. Although there was an effort to impeach or rebut at least some of the anecdotal testimony, respondent's proof consisted basically of an attempt to undermine plaintiffs' showing of classwide import through cross-examination and introduction of its own statistical and other general proof, including extensive expert testimony and exhibits. Although theoretically conceivable, any attempt in a case involving hundreds of class claimants to disprove discrimination by canvassing their detailed work histories on an individual-by-individual basis would have been impractical and unnecessarily burdensome for both the parties and the court, particularly when only liability was at issue. How far the respondent's approach fell short of any such attempt is readily seen

in the fact that it did not call any named plaintiff as a witness, let alone any unnamed member of the class. Respondent could obviously have done so but chose not to as to any potential claimant, not just Torres. He was in no way treated uniquely or separated from the other named plaintiffs in the course of respondent's proof.

Among the written submissions by plaintiffs to the court in the underlying action was a letter sent by their counsel on March 27, 1987, immediately after and supplementing the closing argument which ended on March 24, 1987 (R. 441). That letter specifically called the court's attention to the point that testimony by class members had been introduced merely as anecdotal evidence, in much more limited form than would be expected "were individual remedy at stake"; that it would be "premature and improper" to make findings on whether or not such witnesses had proved valid claims for "individualized relief"; and that any individual-by-individual inquiry "seems clearly to be something to be reserved (if then important) for the remedial stage."³ No response to the contrary was filed by either defendant thereafter.

Not surprisingly, therefore, in finding that respondent's employment practices on a broad front and over a fifteen-year period have been intentionally discriminatory in violation of both Title VII and section 1981 with respect to a large but somewhat narrower class than originally defined, the district court did not now undertake to determine the relief to which any named plaintiff or other member of the affected class is entitled. Torres and all the other plaintiffs-in-intervention originally named fall within the class as redefined, that is, all black and Hispanic-surnamed persons who, on or after January 10, 1972, have been employees of respondent and who have been members of defendant union or have been members of the casual pool. The liability phase has been no less effectually tried as to Torres than as to any named plaintiff or other class mem-

³ We suppose the letter is in the record now before this Court but cannot cite it by docket number because none appears to have been assigned to it.

ber. Individualized canvassing will be appropriate, if at all, at the remedial phase of the trial, which we expect not even to begin for several months. Even at that stage, an individual-by-individual inquiry would, to our minds, be not only unduly burdensome but ungeared to just remedies in view of the large number of claimants involved, the variety of job opportunities invidiously affected, the multiple and intertwined nature of the unlawful practices not readily separable for sure determination of variant operation and harm, the protracted prevalence of an overall invidious atmosphere, etc. The more suitable and, for us, only proper approach to monetary and injunctive relief will be the one recognized to be best in such situations, i.e., calculation of classwide impact through representative techniques and distribution of benefits to individual members in accordance with a formula or formulas reflective of pertinent variables. (See, e.g., *Pettway v. American Cast Iron Company* (5th Cir. 1974) 494 F.2d 211, 261-64.)⁴

⁴ Curiously, respondent's brief, filed on December 30, 1987, two days after entry of the district court's liability opinion and order (R.452), states that decision on liability was still pending (p. 4). We assume that, to borrow respondent's words when first raising the omission of Torres' name, it was apparently by oversight that the inaccuracy as to the status of the liability trial remained in its present brief.

It should also be noted that what we have said in the text about the nature of the liability trial is not accompanied by citations to the record for the same reason respondent's allusions to the trial and assertions of the need for a new and separate liability proceeding as to Torres were not. The record of the trial as a whole, not isolated parts of it, is involved in such discussion. For that matter, we are frankly not even sure to what extent the trial record is now before this Court. As far as we know, for example, no transcript of the testimony is before this Court or even exists. Presumably, too, even the district court's opinion and order have not yet been included in the record lodged with this Court, which was sent up substantially before liability was decided, as we understand the situation. Naturally, at least in the latter respect, any lack could be more formally and rather readily cured should respondent at oral argument or otherwise contest the accuracy of our ac-

(Continued on following page)

III. RESPONDENT FAILS TO REFUTE THAT THE COURT OF APPEALS' JURISDICTIONAL APPLICATION OF RULE 3(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND AFFIRMANCE OF THE SUMMARY JUDGMENT AGAINST TORRES ARE ERRONEOUS AND UNJUST IN LIGHT OF THE SOUND AUTHORITY AND POLICY AND THE EXCEPTIONAL CIRCUMSTANCES INVOLVED.

A. The Failure To Refute The Fatal Clash Of The Jurisdictional View With Sound And Compelling Authority And Policy In Point.

Notwithstanding the discussion in our opening brief (pp. 13-21) of the sound authority and policy considerations fatally to the contrary, respondent's brief (pp. 7-9 and 12-18) persists in championing the rigid and erroneous view of Rule 3(c) of the Federal Rules of Appellate Procedure it persuaded the Court of Appeals to adopt below (App. A to Pet. for Cert.). It thus adheres to the notion that the specification-of-appellants provision of the Rule is strictly jurisdictional and that, therefore, our courts have no authority or power to allow participation in appellate relief by any person not specifically named in a notice of appeal as originally filed or as amended within the demanding time frame elsewhere prescribed in the Rules. In the process, the clash with the compelling precedents and policy we have invoked are impotently brushed aside or totally ignored. Respondent is essentially content, instead, to continue its eyeshut ride to the finish on the dangerous horse provided by broad language in a few cases it deigns to cite. To illustrate:

(1) Even the policy clash of the jurisdictional view with this Court's own teaching and Rules is given a quick kick in the pants and sent summarily out the door. The

(Continued from previous page)

count (which could not be soundly done and we do not expect) or should the Court for any reason deem formal corroboration of our account to be important.

holding and reasoning in *Foman v. Davis, Executrix* (1962) 371 U.S. 178, 181-82, to the effect that harmless non-compliance with federal court rules ought not to result in avoidance of decisions on the merits are essentially sought to be defused in respondent's brief (pp. 14-15, 16) on the grounds that *Foman* involved only the requirement for designation of the matter appealed from, not the one concerning the appealing party or parties, and that the Ninth Circuit's decision in *Farley etc. v. Santa Fe Trail Transp. Co.* (9th Cir. 1985) 778 F.2d 1365, 1369, persisted in preferring a "literal" approach to Rule 3(c) over the "equitable" one and was otherwise kind enough to put *Foman* "into perspective" with language amounting to a muffled declaration that *Foman* was ill-considered and should not be read to mean what it said. Similarly, the embarrassment to the jurisdictional view flowing from this Court's Rule 10.4 is dismissed by respondent's brief (p. 15) with the facile but meaningless observation that, as explained in *Farley*, there is no conflict because this Court's Rules govern appellate practice in the Circuits only as to subjects about which the Rules designed to cover such practice are silent. The important point our first brief raised in this regard (pp. 17-18) does not, of course, depend upon violation of or square control by Rule 10.4. It is, quite simply, that the appellant-specification provision in Rule 3(c), even liberally construed, is at odds with Rule 10.4's automatic inclusion as appellants before this Court of all parties to the proceedings appealed from unless written notice to the contrary is given; that it seems anomalous, particularly in view of this Court's promulgation of both Rules, that two levels of the same judicial system should operate so differently as to such a vital matter; and that the strict jurisdictional view of Rule 3(c) should be rejected not only because it accentuates the difference, but also because it is out of harmony with the sound policy underlying Rule 10.4.

(2) As far as we can find, respondent's brief does not pretend the unsoundness of, or otherwise bother with specific comment upon, any of the cases discussed in our

opening brief (pp. 18-19) as illustrative of the many closely analogous decisions in which Courts of Appeals, including panels in the Ninth Circuit, have relaxed or overridden procedural requirements in the interests of justice. Dogged silence cannot undo the obvious pertinence of the holdings and reasoning in those cases, such as, but hardly limited to, the unequivocal and resounding declaration that, "we have discretion, where the interests of substantive justice require it, to disregard irregularities in the form or procedure for filing a notice of appeal." (*San Diego Comm. v. Governing Board* (9th Cir. 1986) 790 F.2d 1471, 1474.)

(3) Nor does respondent essay any specific address to the considerable discussion in our earlier brief (pp. 20-21) demonstrating that the jurisdictional view of Rule 3(c) is tantamount to a thoughtless abdication of the inherent power to do justice possessed by our Courts of Appeals under settled doctrine of frequent application.

(4) To the scant extent that respondent sees fit to allude at all to the precedents we have cited, its basic approach is an attempt to muffle their decisive import in Torres' favor by substituting focus on asserted factual variations for careful legal analysis. In the first place, of course, we have not relied on those authorities for factual identity in all respects with the present case but for the sound principle and policy for which they stand and with which the jurisdictional view adopted by the Court of Appeals below is in fatal conflict, no matter how much respondent would like to pretend otherwise. In the second place, as illustrated by the examples noted immediately below, the factual maneuvers attempted by respondent (in revealing contrast with the more forthright approach of the Court of Appeals, App. A to Pet. for Cert.) are in themselves empty exercises consisting of sterile distinctions without a difference or of assessments which are clearly false.

(a) In reference generally to the cases which, in the interests of substantive justice, excuse non-compliance

with the requirement for specification of the matter appealed from in notices of appeal, respondent attempts to dismiss them as of no consequence where, as here, the appellant-specification requirement is involved. It is at least doubtful that the latter can be rightly said to be more important than the former, but we submit it as certain that any distinction in that or any other meaningful regard is not so great as to warrant differentiation for purposes of jurisdiction, particularly since both requirements are contained in the same Rule.

(b) As far as concerns the cases we have cited which do unmistakably relax or override the very appellant-specification requirement involved here, respondent's brief at one point (pp. 19-20) is, as we have seen, so careless as to forget that cases of that kind even exist. Elsewhere (p. 14), the point advanced as the most important distinction between the present case and those refusing to embrace the strict jurisdictional view is the toothless one that they did not, as here, involve a situation in which non-specification in a notice of appeal was subsequently made the basis of a summary judgment ousting the unnamed person from participation in the appeal or its benefits and dismissing him. Obviously, whether non-compliance with the appellant-specification provision is or is not jurisdictional turns on the principles and policy considerations made applicable by the substantive circumstances surrounding the omission and not on the procedural framework in which that question is raised and resolved. Indeed, allowing the involvement of summary judgment to alter the outcome and block relief for the unnamed party if otherwise called for would be especially inappropriate. With respect to summary judgment proceedings, of course, and whether in the first instance or on the required de novo review on appeal, the record must be taken in the light most favorable to the party opposing the motion, including all reasonable inferences and constructions. (E.g., *Adickes v. S. H. Kress & Co.* (1969) 398 U.S. 144, 157; *Continental Cas. Co. v. City of Richmond* (9th Cir. 1985) 763 F.2d 1076, 1078-79.) In actuality, all this serves to underscore

that what has happened to Torres is not only substantively erroneous but procedurally flawed.⁵

(c) In defending the jurisdictional view, respondent's brief (p. 13) wanders off the mark and adopts the

⁵ We know of no definitive exposition of the fit procedure for an appellee to follow who wishes to prevent what it regards as overextension of an appeal in a cloudy situation, as where a person unnamed in the notice of appeal was a party below and has the same or similar interest in the subject of the appeal as co-parties specified as appellants in the notice. However, in keeping with past approaches in such situations, we submit that the most suitable, if not the only proper, way for the appellee to seek exclusion of the unnamed person from the appeal or its benefits is by moving the appellate court to dismiss the appeal as to him (e.g., *Van Hoose, et al. v. Eidsen* (6th Cir. 1971) 450 F.2d 746, 747) or by at least making a "contention" or "objection" to that end in its appellate brief (e.g., *Ayres v. Sears, Roebuck & Co.* (5th Cir. 1986) 789 F.2d 1173, 1177; *Parrish v. Board of Com'rs.* (5th Cir. 1974) 505 F.2d 12, 15 [withdrawn on other grounds (1975) 509 F.2d 540]). Respondent here attempted nothing of the kind (even though all the other fifteen persons identically situated with Torres had been specified as appellants in the body of the notice, the phrase "et al." had been used in the caption, and the action aimed at relief for a class inclusive of Torres). Quite the reverse. Respondent merely footnoted that Torres had been left unnamed "apparently by oversight." (J.A. 126-27, 132.) Not having, let alone manifesting, any true concern in the right forum at the right time, respondent later saw a chance to make some hay in the disgruntled afterthought following the adverse outcome on the appeal. By then, however, the erroneous dismissal of the action had been reversed in such complete and unqualified terms as to benefit Torres along with the rest. Thus born in the district court was the resort to summary judgment as the ungainly vehicle for undertaking what (had the omission been of genuine concern there and then) would and should have been undertaken in the Court of Appeals almost three years earlier. Summary judgment, of course, is designed to oust a party because evidence countering his claim on the merits has eliminated every "genuine issue of material fact" on which he can hope to prevail through trial on the merits under the applicable law. (FRCP, Rule 56(c).) Understandably, we are aware of no case in which a post-appeal summary judgment has been entered in the district court against a party on the ground that he was not specifically included among those obtaining an appellate decision which favors, rather than militates against, his claim on the merits.

word "rare" to describe the exceptional circumstances in which Rule 3(c) should not be strictly applied. If the inadvertence and harmlessness of not specifically naming a person in the notice of appeal call for relaxing or overriding Rule 3(c) in the interest of substantive justice, it follows that the jurisdictional view is erroneous, whether the occurrence of such circumstances be rare or common. The important question becomes whether or not such circumstances exist in a case under consideration (an inquiry which, of course, the Court of Appeals did not bother to make because of its strict jurisdictional view of the matter).

(d) Completely lacking in merit, as we have seen under heading II above, is the attempt to distinguish the sound decisions on the fallacious ground that the omission of Torres' name from the notice of appeal is not harmless here in that reversal will necessitate a new liability trial as to him in addition to the one already had.

(e) When we briefly address a bit later the totality of circumstances in Torres' favor, we will have more to say about the multiple fallacies of respondent's effort to make deliberate folly on the part of his counsel the true and sole cause of the problem. However, immediately germane to the futile effort to distinguish the sound decisions we have cited is the non sequitur that here, unlike there, the omission of Torres' name from the notice of appeal was not due to inadvertence or oversight but to counsel's failure to amend the notice when respondent called attention to the omission and assertedly made clear its contention that Torres was not a party to the appeal. To begin with, obviously, the initiating cause here (recognized by respondent itself at the start to have been "oversight," J.A. 132, and established so to have been by counsel's uncontroverted declaration under oath, J.A. 125-27, 131) did not disappear or alter in nature through lack of cure any more than, say, accidental fire stops being the cause of destruction if the owner fails to rebuild the burned-down house. Also, of course, nothing in the unthreatening footnote by which respondent called attention to the "oversight" can

be tortured into a clear contention that Torres was not a party to the appeal. Most important of all in this regard, perhaps, as seems clear from at least three of the sound cases, amendment or attempted amendment of the notice of appeal to add the unnamed person has not been a prerequisite or even a matter of concern in extending the benefits of the appeal to that person where such treatment was otherwise appropriate. (*Ayres v. Sears, Roebuck & Co.* (5th Cir. 1986) 789 F.2d 1173, 1177; *Williams v. Frey* (3rd Cir. 1977) 551 F.2d 932, 935-36; *Parrish v. Board of Com'rs.* (5th Cir. 1974) 505 F.2d 12, 16 [withdrawn on other grounds (1975) 509 F.2d 540].)

(5) The truth is that, rather than the sound cases, it is the ones respondent has affirmatively relied on which are less than ideally fit for the purposes at hand. On close scrutiny, although containing some language helpful to respondent, they do not all, or not even mainly, contain a stark and unswerving, or sometimes any, jurisdictional view in the same say-all-end-all manner mistakenly adopted by the Court of Appeals here. (App. A to Pet. for Cert.) To illustrate:

In *Samuel v. University of Pittsburgh* (3rd Cir. 1974) 506 F.2d 355, jurisdiction was not mentioned, and the appeal was not dismissed for lack of specification of appellants but because the order appealed from was not appealable. In a footnote, the court stated that, in multi-party cases, attorneys "should" designate with specificity which parties are appealing and which are not. The omission of some interested parties from the notice of appeal had apparently been intentional. It was in all events treated as "harmless" in light of the unappealability of the order. (506 F.2d at pp. 356-57, fn. 1.)

In *Cook and Sons Equipment, Inc. v. Killen* (9th Cir. 1960) 277 F.2d 607, 609, the court used the limiting word "here" in stating that much more than a clerical error was involved. The rather ambiguous judgment appealed from appears to have been against not only the corporate defendant but also two individuals connected with it. Only

the corporation was initially specified as the appellant, and the two individuals later moved to be included. The opinion does not set forth with clarity all the facts affecting whether the addition would have been harmful to the opponent, for example, whether it would necessitate briefing and resolution of issues beyond those involving the corporation. However, from such facts as were mentioned, it would appear that the corporation and the individuals were differently situated in at least some respects important to liability.

As to whether the jurisdictional view is or is not sound, *Smith & Assocs. v. Otis Elevator Co.* (5th Cir. 1979) 608 F.2d 126, 127, is more helpful to Torres than to respondent. To be sure, the appeal was dismissed as to an entity not named in the notice of appeal. However, the court stressed that the position of the unnamed entity and the one which had been specified as an appellant was not the same. Rather than suggesting that non-specification was jurisdictional, the court pointed out that the omitted entity had not "substantially" complied with the specification provision as in two cases it cited, including *Parrish* which we have cited and which involved the phrase "et al."⁶

B. The Failure To Refute That The Present Exceptional Circumstances Are Decisive In Torres' Favor Under The Sound Principles.

To some extent above and more fully in our first brief (pp. 2-11 and 22-27) we have discussed the various exceptional circumstances which are decisive in Torres' favor in light of the sound authorities and policy considerations we have invoked. Compared to the other cases against the jurisdictional view, this is a particularly strong one for not allowing non-specification to block merits relief. Indeed, as we have seen, two facts, the representative effect of the notice of appeal and the harmlessness of the

⁶ We acknowledge that, although *Smith* is helpful to Torres, the way we cited it in our first brief (p. 15) may have been somewhat overzealous, that is, it may have been more appropriate to cite it after, rather than before, the words "see also."

omission of Torres' name, are each conclusive of the miscarriage of justice worked by the courts below. However, the unconscionability of the result below is even clearer when the other circumstances are also considered, including: (1) the completely inadvertent origin of the omission; (2) respondent's footnoted recognition of the oversight during the appeal, without threatening posture or expression of any concern; (3) the lack of anything else said or done during the appeal amounting to or presaging a claim that Torres was not a person with an ongoing interest in the matter; (4) the natural consequent belief that no importance was being or would be placed on the omission by either respondent or the court; (5) the birth of respondent's retrospective pretense to the contrary as nothing but a disgruntled afterthought and in the teeth of the complete and unqualified reversal of the erroneous dismissal of the action; (6) respondent's treatment of Torres, even in the remand proceedings, in a way no different from the other named plaintiffs in the course of discovery and otherwise; (7) respondent's exploitation of Torres' continued involvement by use of his deposition in attempting to limit merits issues; and (8) over-arching all, the special reluctance which does and should obtain to close the door on merits relief on procedural grounds where so serious a concern is at hand as the unlawful and intentional employment discrimination which is no longer just claimed but has been judicially established.

In an effort to put the laggard's shoe on the wrong foot, respondent repeatedly trumpets that the problem would not be before us but for the deliberate failure of Torres' counsel to cure the omission by amendment of the notice of appeal. Above (heading III, A, par.(4), sub-par. (e) and fn. 5), we have already noted some of the fallacies advanced in this connection, including (1) the absurdity that respondent's exclusionary claim was made clear by its unthreatening footnote and (2) the errant idea that it was incumbent upon Torres to amend and not upon respondent to act if limitation had been truly a concern rather than a disgruntled afterthought. Additionally, this is all "double-

think." Under the jurisdictional view as espoused by respondent in the Court of Appeals, any attempt to amend would have failed because the thirty-day filing limitation set by Rule 4(a)(1) had long expired.

We resent the speculation that the appeal was counsel's idea and not Torres', who could have wished to avoid possible liability as to attorney's fees and costs. No effort was made to controvert the sworn showing of Torres' own intent. (J.A. 125.) The reality about liability for fees and costs is that successful appeal would negate his exposure to the motion for them respondent filed immediately after the erroneous dismissal.

Also resented is the stamping as "egregious" of counsel's directing his secretary to specify appellants in accordance with the complaint in intervention, especially since its caption did not name Torres. Ignored is that all the intervenors, including Torres, were specifically listed in the body of the complaint. (J.A. 84.) Assuming that the caption was used instead shows at most that the clerical omission involved in the notice of appeal had an earlier origin. The truth is that, by trying to make the caption control, respondent is burning down the house to roast the pig. The same caption omitting Torres was used in erroneously dismissing the action (J.A. 87-88) so that the dismissal would not have applied to Torres at all.

IV. RESPONDENT MISREPRESENTS THE RELIEF SOUGHT AND MAKES SILLY JURISDICTIONAL AND RES JUDICATA ARGUMENTS.

Respondent misrepresents the relief we seek in more than one place, including its argument aimed at ouster of this Court's jurisdiction. As our petition and first brief made clear from start to finish, the relief we think proper is simply reversal of the Court of Appeals with directions to reverse the summary judgment against Torres and remand for his full reinstatement as a named plaintiff. Nowhere will addition of his name be necessary to that end. The mention in our brief (p. 31) of recall of mandate and amendment of the notice of appeal was only to apprise the

Court of possible additional relief if, unlike us, the Court deems it appropriate. Certainly, we did not bring this proceeding to reverse the order of April 14, 1986, so that the asserted untimeliness of our petition to attack it is meaningless even if it was subject to certiorari (which we doubt, particularly because, as far as appears, its basis was nothing but procedural deference to the present appeal already pending).

No less silly on its face is the argument that Torres' lack of right even equal to that of inactive class members is res judicata by reason of the summary judgment against him even though it expressly reserved decision on the point (App. B to Pet. for Cert., p. 4) and even though its validity for any purpose is at issue in this very proceeding.

Respectfully submitted,

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